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ABSTRACT

Articles written primarily by practicing school attorneys who represent public school clients are compiled in this publication. Information about how the establishment and free exercise clauses of the First and the Fourteenth Amendments of the U.S. Constitution affect curriculum, student programs and activities, teacher employment, and school board administrative decisions is presented. Articles are as follows: "Public Aid to Parochial Schools," by Dennis G. O'Hara; "An Analysis of the Expansion of Free Exercise and Establishment Clause Challenges to Curriculum and Instructional Practices in the Public Schools," by Jay Worona and Margaret Chidester; "Unemployment Benefits and Free Exercise Rights," by Jeffrey A. Davis; "Use of Facilities by Outside Religious Groups," by John S. Aldridge; "Religious Garb: May Public School Teachers Wear It?" by Fay Hartog-Rapp, Gretchen Winter, and Michele Freedenthal; "Home Schooling," by Perry Zirkel and David B. Rubin; "Accommodation of Employees' Religious Observances," by Fay Hartog-Rapp, Gretchen Winter, and Michele Freedenthal; "Policies and Practices on Religious Expression in the Schools," by Cynthia Lutz Kelly and Naomi E. Gittins; and "The Equal Access Act and Student Groups," by Stephen S. Russell. Membership and publication information about the National School Boards Association Council of School Attorneys is included. (LMI)

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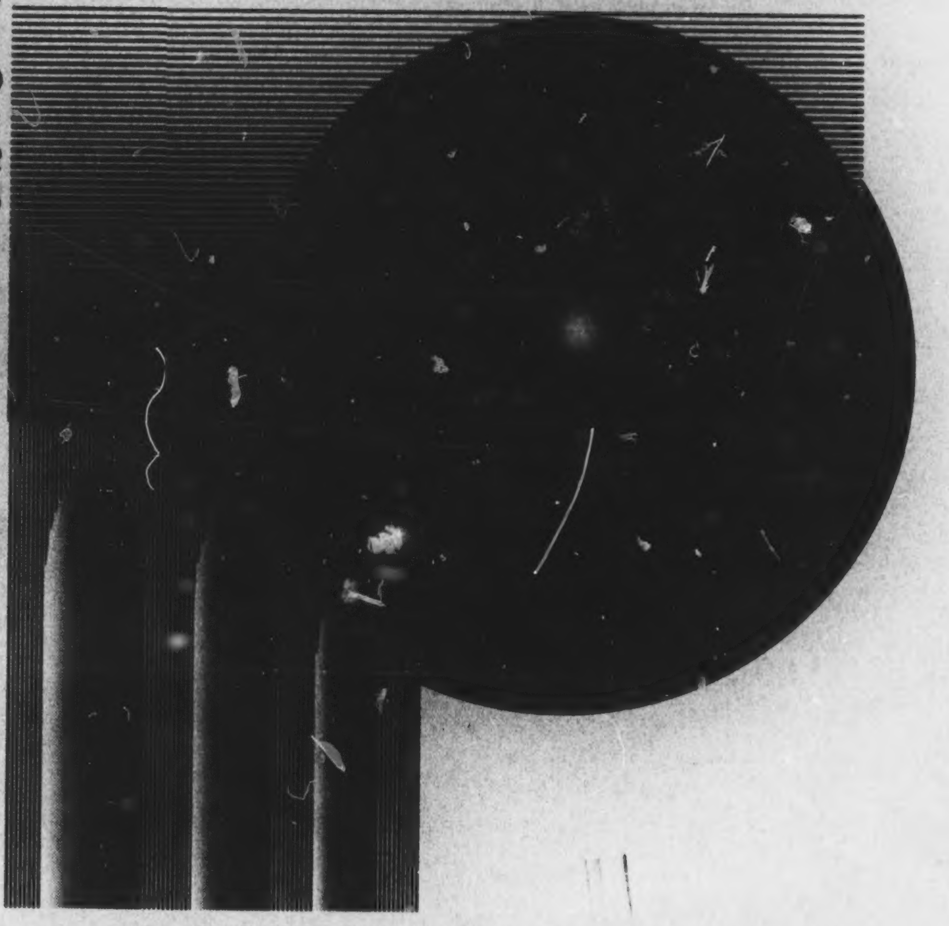

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Religion, Education and the U.S. Constitution

An NSBA Council of School Attorneys Publication

EA 022 103

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Religion, Education and the U.S. Constitution

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NSBA
LEADERSHIP FOR PUBLIC EDUCATION

May 1990

About the NSBA Council of School Attorneys . . . .

Since 1967 the National School Boards Association's Council of School Attorneys has provided information and practical assistance to attorneys who represent public school districts. As the only national advocacy organization composed exclusively of attorneys representing school boards, NSBA's Council advises NSBA and its members on school law issues. It offers continuing legal education programs, produces specialized publications, and provides up-to-the-minute analysis of the issues. Council seminars are valuable forums for school attorneys to exchange ideas and information.

More than 2,700 attorneys, representing local school districts of all sizes, find membership in NSBA's Council of School Attorneys essential for keeping abreast of school law issues and trends. Attorneys in thirty-two states receive these benefits through membership in their state school attorneys' councils which have affiliated with the NSBA Council of School Attorneys. States with affiliated councils include: Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia.

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FOREWORD

Religion, Education and the U.S. Constitution is a compilation of articles written primarily by practicing school attorneys who represent public school clients. Collectively, these articles represent an essential body of professional knowledge necessary for understanding how the establishment and free exercise clauses of the first amendment and the fourteenth amendment affect curriculum, student programs and activities, employment and administrative decisions made by school boards.

The information provided in these articles is intended to provide practical tips for considering the constitutional provisions affecting religion and the public schools. It is not, however, intended as legal advice. When questions arise concerning policies and practices possibly impacted by these constitutional provisions, a qualified school attorney should be consulted.

I wish to thank the school attorneys who contributed their time and expertise to this publication and to recognize the efforts of Susan R. Butler, Virginia Weiss and Jennifer A. Williamson who prepared these articles for publication.

Donald B. Sweeney, Jr.
Chairman
NSBA Council
of School Attorneys

"School board members, responsible for developing polices which govern religious practices in the schools, must be sensitive to their constituencies, but also must have a clear undertstanding of the constitutional principles which limit the extent of their authority when acting in this volatile area."

Cynthia Lutz Kelly
Kansas Association of School Boards

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TABLE OF CONTENTS

PAGE

FOREWORD

PUBLIC AID TO PAROCHIAL SCHOOLS
by: Dennis G. O'Hara
O'Hara & Crough
Syracuse, New York 1-1

AN ANALYSIS OF THE EXPANSION OF FREE EXERCISE AND ESTABLISHMENT CLAUSE CHALLENGES TO CURRICULUM AND INSTRUCTIONAL PRACTICES IN THE PUBLIC SCHOOLS
by: Jay Worona, New York State School Boards Association, Albany, New York
Margaret Chidester, Parker & Covert, Santa Ana, California 2-1

UNEMPLOYMENT BENEFITS AND FREE EXERCISE RIGHTS
by: Jeffrey A. Davis
Jackson & Walker
Houston, Texas 3-1

USE OF FACILITIES BY OUTSIDE RELIGIOUS GROUPS
by: John S. Aldridge
Hairston, Walsh, Anderson, Underwood & Schulze
Austin, Texas 4-1

RELIGIOUS GARB: MAY PUBLIC SCHOOL TEACHERS WEAR IT ?
by: Fay Hartog-Rapp, Gretchen Winter and Michele Freedenthal
Seyfarth, Shaw, Fairweather & Geraldson
Chicago, Illinois 5-1

HOME SCHOOLING
by: Perry Zirkel, Lehigh University, Bethlehem, Pennsylvania
David B. Rubin, Rubin, Rubin & Malgran, Piscataway, New Jersey 6-1

ACCOMMODATION OF EMPLOYEES' RELIGIOUS OBSERVANCES
by: Fay Hartog-Rapp, Gretchen Winter and Michele Freedenthal
Seyfarth, Shaw, Fairweather & Geraldson
Chicago, Illinois 7-1

POLICIES AND PRACTICES ON RELIGIOUS EXPRESSION IN THE SCHOOLS
by: Cynthia Lutz Kelly, Kansas Association of School Boards, Topeka, Kansas
Naomi E. Gittins, National School Boards Association, Alexandria, Virginia 8-1

THE EQUAL ACCESS ACT AND STUDENT GROUPS
by: Stephen S. Russell
Pennsylvania School Boards Association
New Cumberland, Pennsylvania 9-1

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Public Aid To Parochial Schools

Dennis G. O'Hara*
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Initially, the federal Constitution did not prevent either religious involvement with public education or state involvement with religious education. In this nation's infancy, it was not unusual for public schools to be engaged in the inculcation of "common" religious values in the public schools. In fact many superintendents of schools were also clergymen.[1]

This entanglement of religion and public education was made possible because the first amendment applied only to the federal government, and each state determined the extent of its involvement with religion.[2] Although ratification of the fourteenth amendment in 1868 prohibited the states from infringing upon the civil rights of their citizens, it was not until 1940 that the United States Supreme Court found the first amendment applicable to the states by virtue of the fourteenth amendment.[3] It is now well established that both the free exercise clause[4] and the establishment clause[5] are binding on the states so as to prohibit public funding to or in aid of parochial schools. Since 1940, the inquiry has been whether, to what extent, and on what theory may the states assist parochial schools to carry out the public function of educating our youth.

Several theories have been advanced to justify the expenditure of public money in parochial schools in the face of a first amendment challenge. A primary one is the "pupil benefit theory", which holds that individual pupils, not the parochial school, actually receive the benefit. Another is that the specific expenditure is an exercise of the state's police power, even though a religious school may be an incidental beneficiary of that expenditure.

In applying these theories to specific facts, the Supreme Court has developed a three-prong test to determine whether state action with respect to parochial schools violates the establishment clause of the first amendment. This test was initially articulated in *Lemon v. Kurtzman,*[6] in which a Rhode Island statute providing salary supplements to teachers of secular subjects in nonpublic elementary schools and a Pennsylvania statute authorizing state reimbursement to nonpublic schools for the cost of teacher's salaries, textbooks, and instructional materials in secular subjects were challenged on first amendment grounds. In *Lemon*, the Supreme Court held that a state statute or other action does not violate the first amendment if:

(1) it has a secular legislative purpose;

(2) its principal or primary effect neither advances nor inhibits religion; and

(3) it does not foster an excessive government entanglement with religion.[7]

The *Lemon* test has since been utilized several times to test the constitutionality of a variety of public assistance programs to, or for the benefit of, students attending religious schools.

TRANSPORTATION

Transportation was one of the first public services to parochial school students to come under Supreme Court scrutiny. In 1947, the Supreme Court held in *Everson v. Board of Education* that transportation of students who attend nonpublic schools does not violate the establishment clause.[8] The Court reasoned that the pupil, not the parochial school, was the direct benefici-

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* *The author gratefully acknowledges the assistance of Craig M. Atlas in the preparation of this article.*

ary of the aid. The primary purpose and effect of the expenditures was to transport students to and from school safely and expeditiously, and this benefitted religious institutions only incidentally. The Court also concluded that it is constitutional to grant general public welfare benefits to all persons, regardless of an incidental benefit to religion. In other words, public funding of transportation promoted the general public welfare, and only indirectly benefitted religion by relieving parochial schools of an operating expense.

The *Everson* decision held that public funding of nonpublic school transportation was neither required nor barred by the federal Constitution.[9] However, in determining the legality of such funding, states must satisfy the requirements of their own statutes and constitutions.

For example, *McCarthy v. Hornbeck*[10] concerned a challenge to Maryland's system of transportation for nonpublic school children. Each county in Maryland received an allocation of state aid for the transportation of public school students and could provide more transportation services at its own expense. There was no state law which required transportation for private school students. However, approximately half of Maryland's counties had authorized such expenditures by local law. The plaintiffs contended that the failure to uniformly provide transportation for all parochial school students throughout the state burdened their right to the free exercise of religion.

The court rejected this argument and distinguished prior decisions which held it unconstitutional to condition the receipt of a general welfare benefit upon the non-assertion of a free exercise right,[11] on the basis that school transportation was not a general welfare benefit. The court reasoned that, although parents have a constitutional right to enroll their children in parochial schools, the state is not constitutionally required to subsidize transportation to and from such schools. In other words, although the pupil benefit theory *permits* the state to provide transportation services to parochial school students, it does not require it to do so as a matter of constitutional law.

The court acknowledged that failing to provide school transportation placed an incidental, indirect economic burden on the plaintiffs' right to freely exercise their religion. However, that burden does not prohibit the plaintiffs from practicing their religion or from sending their children to parochial schools. Although lack of public transportation to private schools may have made practicing religious beliefs more expensive for the plaintiffs, it did not infringe their free exercise rights.

It is clear that if public funding directly benefits a religious institution, there is a constitutional violation. It is also clear that when the primary benefit is for the student, the establishment clause is satisfied. In between these two absolutes are an almost infinite number of gradations, and it is on this middle ground that most litigation has been fought. Fertile areas for dispute are field trip transportation , interdistrict transportation and special transportation.

Field Trip Transportation

In *Wolman v. Walter*,[12] the Supreme Court struck down public funding of transportation for field trips for parochial school students. The critical factor in the Court's view was that the parochial schools had control of the timing, frequency and destination of the trips, leading the court to conclude that the school received a direct benefit in violation of the establishment clause.[13] It is clear, therefore, that any field trip transportation subsidy must involve considerable (if not exclusive) public control in order to withstand a challenge under the establishment clause.

This leaves open the question of how much suggestive input (and not control) by parochial schools would be constitutionally permissible regarding field trips. Most likely, it also permits narrower public transportation for field trips in those instances where public school authorities control the destination, frequency and purpose of such trips. This would appear to be particularly true if such transportation is substantially comparable to that which is provided to public school children.

Interdistrict Transportation

The *Everson* decision gives each state wide discretion to determine what transportation services it will provide for private school students, consistent with its constitution and statutes. Many states have enacted distance statutes, which provide that public transportation will be offered to private school students who live beyond a specified distance from a particular school, while denying such services to students who reside within that distance. These discretionary statutes have generally fared well under equal protection and establishment clause challenges.[14] While a statute which provides special service only to private school students has been found to violate the establishment clause,[15] statutes which provide public transportation to out-of-district schools have been upheld if eligibility for transportation is based upon objective criteria, such as distance, which apply both to students attending public and private schools, even where it is evident that the benefit flows primarily to private school students.[16]

In *Members of Jamestown School Comm. v. Schmidt,*[17] the First Circuit Court of Appeals held that interdistrict busing of public and private school students did not violate the Constitution so long as it was facially neutral.[18] The court noted that the service to private school children need not be of precisely the same distance, cost or frequency as that given to public school students in order to be facially neutral.[19] The key element appears to be availability to all students or simply the lack of exclusive or special service to private school students.

Thus, states may provide for interdistrict and intradistrict transportation of students to and from parochial schools, and states have wide discretion to determine the extent of transportation to be provided. Although the state may not exclusively benefit parochial school students, the reverse is not true and a state may determine to provide transportation for public school students and deny it to others.[20] Courts have also upheld state statutes which provide public transportation for private school students, but deny it to parochial schools on the basis of the institutions' religious affiliations.[21]

Special Attention to the Private School Student's Needs

There have been conflicting results where the special circumstances of the private parochial school student must be taken into account in providing public transportation. Once again, the extent to which special attention may be provided for such students is almost exclusively dependent on state law. This fact has produced some interesting results.

For example, it has been held that where a state provides funds to transport students to and from private schools, it will necessarily extend to transportation to and from after-school activities such as sports, detentions and clubs which are held at the school site.[22] These activities are considered a component of education and should be provided to the extent they are made available for public school students.

Conversely, where public transportation of parochial school students is provided, courts have held that this does not entitle a student to transportation to a more distant school of the same religious sect as the student, or to another school on the basis of a more desirable curriculum.[23] Thus, private school students may not receive greater services than those which are available to public school students,[24] particularly where special transportation needs arise out of the religious beliefs of the student.

Indeed, in *Bollenbach v. Board of Education,*[25] a federal district court held that both the equal protection clause and Title VII of the Civil Rights Act of 1964[26] were offended where male bus drivers with less seniority were assigned over female drivers on the basis of gender because separation of sexes was a fundamental religious belief of the student passengers.[27] The court found that the exclusive use of male drivers violated the establishment clause because it had the effect of transforming a neutral service into a promotion of the religious tenet that men and women should be separated.[28] The court acknowledged that forcing Hasidic students to either ride the bus with a female driver (thereby violating the precepts of their religion) or to forego publicly funded transportation altogether, burdened their rights to free exercise of their religion. However, this was held to be an acceptable infringement because of the compelling state interest in avoiding the establishment clause violation which resulted from the "male drivers only" policy.[29] The *Bollenbach* court also held that the female drivers' civil rights under Title VII were violated by the practice.[30] Similarly, where a student's religious beliefs require him to ride a bus peopled entirely by those of the same gender or sect, the establishment clause prohibits publicly funded transportation which caters to this religious requirement.

It appears, therefore, that the establishment clause will tolerate little more special attention to the transportation needs of parochial school students than that which is customarily required for public school children. When the nature of the service must be tailored to suit the unique requirements of a particular religion, the establishment clause requires the student to choose between violating his or her religious tenets or foregoing publicly subsidized transportation.

Whether transportation services to private school students are permissible as a "pupil benefit" or a public welfare measure, or whether such services violate the establishment clause as impermissible aid to a nonpublic school, will depend in large measure on provisions of state law and state constitutions.

As a general rule, the greater the possibility for religion to influence the type and extent of transportation service provided, the more possible an establishment clause violation. With approximately half of the states having some form of statutory provision for nonpublic school transportation, many of which remain untested under their state constitutions,[31] this issue is certain to be the subject of greater judicial scrutiny in the future.

TEXTBOOK LOAN PROGRAMS

Another common form of public assistance to parochial schools is a program under which the state purchases standard textbooks for "loan" to parochial students.

In *Board of Education v. Allen*,[32] a New York state statute authorizing boards of education to loan textbooks to nonpublic school students was held not to violate the establishment clause, on the theory that the books were loaned to individual students, not to the parochial schools.

Seven years later, in *Meek v. Pittenger*,[33] the Supreme Court upheld the constitutionality of a Pennsylvania statute which also provided for the loan of textbooks to students in nonpublic schools following its prior holding in *Allen*. However, it struck down that portion of the statute which provided instructional materials other than textbooks directly to nonpublic schools. The rationale for the Court's distinction between textbooks and other instructional materials was twofold. First, the statute authorized the loan of textbooks to individual students, but provided for the loan of other instructional materials directly to nonpublic schools. Second, because of the predominantly religious character of the schools benefiting from the statute, the Court found that substantial aid to their educational function necessarily resulted in aid to their religious mission. The Court viewed direct aid to nonpublic schools for these materials as having the primary effect of advancing religion.[34]

In *Wolman v. Walter*,[35] the Supreme Court upheld an Ohio statute providing for loans of textbooks to students attending nonpublic schools, finding it similar to the statutes in *Allen* and *Meek*, after declining an invitation to overrule those cases. Once again, the Court held that the provision of instructional materials and equipment violated the establishment clause. These materials had previously been provided directly to nonpublic schools, as was the case in *Meek*, and the Court found that the change in Ohio's law, which channeled the instructional materials to individual students, was a change in form rather than substance. The Court did not clearly enunciate the distinction between textbooks and instructional materials, simply stating that it would follow *Allen* with respect to textbooks as a matter of *stare decisis*.[36]

For obvious reasons, the rationality of a constitutional distinction between textbooks and instructional materials is open to question. Loaning textbooks to parochial school students permits the school to spend money for religious purposes that it would otherwise have used to purchase secular books. That the distinction between textbooks and instructional materials is a distinction without a difference was recognized by separate opinions in *Meek* and *Wolman*. As Justice Powell wrote in *Wolman:*

> Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable.[37]

More recent cases have served to blur the distinction further. For example, in *Mueller v. Allen*,[38] the Supreme Court stated that state assistance for the rental of equipment such as calculators, ice skates and tennis shoes for use in parochial schools does not violate the establishment clause.

Currently, an action is pending in the United

States District Court for the Northern District of New York challenging a New York statute which authorizes public school districts to loan computer software programs to students attending private schools.[39] The court in that case must decide whether software in today's computer-oriented society is the equivalent of a textbook, or whether it is more analogous to "instructional materials and equipment". The former would be permissible and the latter presumably would constitute a violation of the establishment clause.

Although the loan of textbooks is permissible, students who attend nonpublic schools do not have a constitutional right to demand the same. For example, in *Norwood v. Harrison,*[40] the Supreme Court held that loaning textbooks to students attending racially exclusive private schools violates the equal protection clause. Also, loaning textbooks to students who attend parochial schools must be examined against applicable state constitutions and statutes. South Dakota textbook loan statutes have been held to violate provisions in the state constitution which prohibit aid to sectarian schools.[41] On the other hand, the Nebraska Supreme Court has held that a statute requiring public school districts to purchase textbooks and to loan them to students attending private schools does not violate Nebraska's constitutional prohibition against providing public funds to private schools.[42] Obviously, the validity of textbook loan programs will depend upon the language of the state constitution and statutes.

STANDARDIZED TESTING

In *Committee for Public Education and Religious Liberty v. Regan,*[43] the Supreme Court upheld a New York state statute which reimbursed nonpublic schools for the cost of complying with state-mandated testing and reporting requirements. The Court distinguished an earlier statute which it had struck down in *Levitt v. Committee for Public Education,*[44] on the basis that some of the tests at issue in *Levitt* had been prepared by teachers in nonpublic schools, while the revised statute reimbursed nonpublic schools only for costs associated with state-prepared examinations. The revised statute also provided an audit procedure to insure that only the actual costs of providing secular services would be reimbursed.

Similarly, in *Wolman v. Walter,* [45A] the Court upheld an Ohio statute providing standardized tests and scoring services for students attending nonpublic schools. Nonpublic school personnel did not prepare or score the tests, and state aid was not provided for their costs of administering the tests. The nonpublic schools did not control the tests or their results.[45B]

In *Decker v. O'Donnell,*[46] the Seventh Circuit enjoined the placement of CETA[47] workers in parochial schools to administer and grade examinations. Distinguishing *Regan,* the Court found that the placements were not limited to state-mandated tests. It also determined that there was the danger of CETA workers under school control grading essay tests on religious topics, unlike *Regan,* where the tests consisted exclusively or largely of multiple-choice questions.

TEACHERS' SALARIES AND CHAPTER 1 SERVICES

In *Lemon,* the Supreme Court invalidated two state programs providing teacher salary supplements and salary reimbursements, on the ground that the government surveillance required to ensure that public school teachers did not promote religion would create excessive entanglement between church and state. This is a reoccurring issue since there is no shortage of federal and state programs which aid private and parochial schools. One such program is Chapter 1 of the Education Consolidation and Improvement Act of 1981 (the "ECIA").[48] Several sections of this statute specifically relate to students attending private schools, and a basic program requirement is that educationally deprived children enrolled in private schools receive special educational service expenditures equal to those for children in the public schools, taking into account the number of children to be served and their special educational needs.[49] The services are to be provided after consultation with private school officials.

Chapter 1 also contains a bypass mechanism[50] which provides that, if a public school district is prohibited by state law from providing services to children in private schools, or if it fails to provide for their participation on an equitable basis, the U.S. Secretary of Education will provide the services directly. The Secretary may withhold federal aid to the state or local school district to pay for the cost of the services.

A provision in Chapter 2 of the ECIA,[51] which consolidated smaller categorical programs into block grants[52] authorizes the provision of "secular, neutral, and nonideological services, materials, and equipment" to students in private, nonprofit schools. Services may be provided either by employees of a public agency or by an independent contractor who is independent of the private school and of any religious organization.[53] The statute also contains a bypass provision.

Federal funding is also available for several specific programs which benefit private school children and, in some cases, teachers. These include mathematics and science education,[54] foreign language assistance,[55] gifted and talented education,[56] immigrant education,[57] and drug education.[58]

Under the *Lemon* test, public subsidies to parochial schools face a "Catch 22" situation. If funding is provided without supervising the teachers' presentations, it runs the risk of promoting a particular religion. Conversely, government regulation to ensure that public funds are not used for religious indoctrination may result in excessive entanglement of church and state. The conundrum inherent in the *Lemon* test is exemplified by court decisions relating to services provided under Chapter 1 to parochial school students.

In *City of Grand Rapids v. Ball*,[59] the school district of Grand Rapids, Michigan had a "shared time" program, in which public school teachers taught classes in classrooms located in and leased from parochial schools. The school district also had a "community education" program, in which classes were taught in private school classrooms by part-time public school employees. In practice, most of the teachers were also fulltime employees of the nonpublic school.

The Court held that these programs violated the second prong of the *Lemon* test because their primary effect was to promote religion in three regards. First, the Court found that the teachers may be influenced by the pervasively sectarian environment of the parochial schools, and they may either subtly or overtly conform their instruction to this environment, thus indoctrinating the students in particular religious beliefs at public expense. Second, the Court found a symbolic union of church and state when public instruction is provided in a religious school, which conveys the message of state support for the religious denomination which maintains the school. Third, the programs were seen as a direct subsidy to the religious institutions.[60] The Court specifically rejected the "pupil benefit" argument that the program aided individual students, not the parochial schools.

In *Aguilar v. Felton*,[61] the Supreme Court held that a Chapter 1 program in New York City also violated the establishment clause. In that case, public school employees conducted programs on the premises of parochial schools. Their supervisors occasionally made unannounced visits to the parochial schools to monitor the religious content of the classes. The program required both regular inspections of the religious schools for religious matter in Title I classes and close cooperation between public and parochial school administrators and teachers. The Court held that, even if the close supervision prevented the program from having the primary effect of advancing religion, it resulted in the excessive entanglement of church and state. In the Court's view, such entanglement would not only infringe upon the freedom of religion of persons who are not adherents of the denomination involved, but it would also limit the freedom of adherents of the denomination by "secularizing" religion.

Wamble v. Bell[62] held that the bypass provision of Chapter 1 does not, on its face, violate the establishment clause. However, the district court did find that the bypass, as administered in Missouri on the premises of parochial schools, violated the establishment clause, because it both had the effect of advancing religion and led to the excessive entanglement between church and state. On the same day that it decided *Grand Rapids* and *Aguilar*, the Supreme Court dismissed the appeal from this decision for want of jurisdiction.[63]

There has, of course, been litigation in the wake of *Aguilar*. For example, *Parents' Association of P.S. v. Quinones*[64] involved Chapter 1 remedial education classes for students of an all-girls private school on the premises of a public school in New York City. The students were Hasidic Jews who believed in the separation of males and females. In an effort to accommodate these religious beliefs, the public school closed off a group of classrooms by constructing swinging doors and supporting walls. The segregated part of the building was to be used for the Chapter 1 classes taught by female public school teachers.

The court held that this plan violated the establishment clause, because it would have the primary effect of advancing the students' religion. The court was concerned that the plan would give the impression that the city supported the Hasidic religion, and that this impression would lead to divisiveness in the school and in the community. The court rejected the claim that enjoining the plan would violate the students' rights to freely exercise their religion, stating that the free exercise clause does not prohibit government from forcing a choice between receipt of a public benefit and pursuit of a religious belief, if it can show a compelling reason for doing so. The court found that avoiding a violation of the establishment clause was such a compelling reason.

Pulido v. Bennett[65] involved a taxpayer's challenge to the Chapter 1 guidelines issued by the U.S. Department of Education after *Aguilar* which authorize the use of mobile vans or other portable classrooms to provide Chapter 1 services on public property near private schools. The guidelines also authorize the government to lease or purchase property from private schools as a site for portable classrooms. The Eighth Circuit initially held that the plaintiffs lacked standing to challenge the constitutionality of the program as implemented in Missouri. However, on rehearing, the court modified its earlier decision in light of *Bowen v. Kendrick*,[66] finding standing and remanding for further proceedings.

On remand the district court held that the U.S. Department of Education's "off-the-top" requirement violates the establishment clause of the first amendment. This requirement provides that the expenses of assuring the "equitable participation" of private school students in Chapter 1 services must come "off-the-top" before distribution of funds between private and public school students. The court refused, however, to overturn the bypass provision under which the Department must take over the responsibility of serving private school students where the state neglects or refuses to do so. Missouri law prohibits providing aid to religious schools so the Department has instituted the bypass provision in that state.

The court in this case also ruled that the Constitution is violated by the provision of Chapter 1 services to religious school students in mobile units or vans placed on private school property, but it is not unconstitutional to place the vans or units on public property, no matter how close the placement to the private school.[67]

STUDENT TEACHING

St. Cloud State University, a Minnesota public university, had a policy of permitting students to fulfill student teaching requirements at parochial schools. Under that program, the university gave the parochial schools state funds[68] and an opportunity to evaluate the student teachers for future employment. When this policy was challenged, the Eighth Circuit held that it violated the establishment clause because it had the primary effect of advancing religion. The court found that the program also created the perception of a symbolic union between church and state in the minds of the parochial school students.[69]

AID FOR HANDICAPPED CHILDREN

A public school is not relieved of its obligations to provide special education for handicapped residents because they are enrolled in a private school. The Education for All Handicapped Children Act (EHA)[70] and the regulations adopted pursuant to the EHA,[71] provide that every handicapped pupil, including a student in attendance at a private school, has a right to a free appropriate public education and related services.[72] This does not mean, however, that the public school is required to pay for the child's education at the private school if it has available a free appropriate public education and it is the parents' choice to place the child in a private school. Rather, it must simply make special education services available to such a child.[73]

Required special education services are to be provided in such a manner that parochial school students will receive a "genuine opportunity for equitable participation" in the program;[74] will enjoy program benefits comparable in quality, scope and opportunity for participation as provided to students in public schools;[75] and will benefit from the same average amount of federal funds as are spent on students in the public school, unless the average cost of serving the private school students is different.[76]

The public school is to initiate and conduct the meetings to develop, review, and revise the individualized education program for each handicapped child under its jurisdiction. In doing so, it is to ensure that a representative of the parochial school attends each meeting. If the representative cannot attend, the public school is to use other methods to ensure participation, including individual or conference telephone calls.[77]

The question, of course, is how and where such services are to be made available. The EHA does not require that special education services be provided at either the public or nonpublic school. The state and local agencies are free to meet their obligations in a number of different ways, as long as the obligation to provide equitable participation for private school handicapped children is satisfied.[78]

Aguilar v. Felton[79] related only to Chapter 1 instructional services. The U.S. Department of Education has taken the position that, inasmuch as *Aguilar* did not involve administration of the EHA with respect to parochial school students, that decision does not prohibit special education services at the parochial school.[80] In fact, depending upon the needs of the child, it is argued that to prohibit on-premises instructional services for handicapped children may make it impossible to provide the instructional services required by the EHA.[81]

The New York State Court of Appeals recently held that neither the EHA nor state law requires that services be provided only at the public school, as the school district had contended was required by *Aguilar*. The court also concluded that special education services are not required to be provided in the nonpublic schools or at a neutral site, as the parents of handicapped children attending nonpublic schools asserted. The court did not decide where particular services may be provided.[82]

The New York case involved children residing in Kiryas Joel, a village whose residents are all Hasidic. Responding to residents of the village and the surrounding communities, and school district officials, the State Legislature passed a bill establishing a separate school district for Kiryas Joel, carved out from the former public school district. It was signed into law by Governor Mario Cuomo on July 24, 1989.[83] It is intended to permit the new district to establish its own school for handicapped children. Since all of the residents of the proposed district are Hasidic, this raises the question of whether state aid to the district would have the primary effect of advancing religion.[84]

TUITION ASSISTANCE

Though often the topic of debate, there is currently no federal or state tuition voucher program involving private schools anywhere in the United States.[85] Two states, Louisiana and Minnesota, provide tax credits to defray tuition costs for parents of students attending private, non-profit elementary or secondary schools.[86] Also, there does not appear to be much prospect for either a tuition voucher or a tuition tax credit program on the federal legislative horizon. While President Bush and the Republican Party have long expressed the desirability of tuition tax credits, the President has not included such a proposal in his education platform. The President noted:

> I've been intrigued with the concept of tuition tax credits, . . . [a]nd some say, well, should that include parochial schools? And I've said, yes, but the problem again is that we can't afford to do that.[87]

Accordingly, there are no bills currently pending in Congress that would provide either a federally administered tuition voucher or tax credit program. Indeed, the only remotely relevant legislation currently under consideration is a House bill that would provide a federal income tax deduction for parental contributions to educational savings accounts set up for their children.[88]

There is, however, considerable activity at the state legislative level regarding tuition assistance programs. Bills to enact either tuition voucher or tax credit programs are currently pending before the legislatures of Illinois (H890/S946, S1204), Kansas (S149), Massachusetts (S1509, S1513), Maine (S492), Minnesota (H1766), Nebraska (L346), New York (A2179, A5831, S203), and Texas.[89] These bills typically provide a state personal income tax deduction for the parents or guardians of school children for costs incurred for tuition, non-religious books and transportation. They are available to parents of children who attend public, private and parochial schools.

Most of the above-mentioned bills concern tuition tax credits. However, the Illinois, Maine, New York and Texas bills propose vouchers. The Illinois proposal would divide a $120 million increase in state school aid among the state's two million students, providing each with a voucher worth about $60. The Texas proposal seeks to provide private school students with vouchers worth up to $2,500 which would be applied to defray the cost of tuition. The Maine and New York bills provide for lengthy governmental study and demonstration programs to determine the desirability of voucher systems.[90]

None of these state bills are close to passage, and many are not expected to pass. With no federal program for either tuition vouchers or tax credits, and only two state programs for tuition tax credits, and little in the way of likely state or federal legislation to that end, it is unlikely that we will witness a rapid expansion of such systems in the near future. The deterrent is political and not constitutional, however, since the courts will likely uphold such programs under the establishment clause.

Constitutional Issues

In *Mueller v. Allen*,[91] the Supreme Court upheld the constitutionality of the Minnesota tuition tax credit which permits taxpayers who itemize their deductions to deduct up to $650 for each dependent in grades K to 6 and up to $1,000 for each dependent in grades 7 to 12.[92] (These amounts have been increased since *Mueller*, when they were $500 and $700 respectively.) It applies to students who attend public or private non-profit schools and covers expenses incurred for tuition, textbooks and transportation.[93]

The Court had previously held similar programs to be unconstitutional. In *Committee for Public Education and Religious Liberty v. Nyguist*,[94] a New York statute which provided tax credits only for parents of nonpublic school children was held to violate the establishment clause because it had the inevitable effect of subsidizing and promoting the religious missions of sectarian schools. In striking down the New York statute, the court relied on the three-prong *Lemon* test.[95] In *Sloan v. Lemon*,[96] the Court struck down a Pennsylvania statute after finding no significant difference between it and the New York statute invalidated in *Nyguist*. The Court was unpersuaded by the argument that the program only aided low-income parents, whose right to have their children educated in sectarian schools would be diminished, thereby amounting to a denial of equal protection.

In the *Allen* case of 1983, the Supreme Court distinguished the Minnesota tuition tax credit program from those previously prohibited by *Lemon* and *Nyguist*.[97] The Court found that the statute did not offend the establishment clause, primarily because the deduction was available for children attending public schools as well as for children attending sectarian and other private schools. The Court saw the statute as neutral and non discriminatory both on its face and in practice, thus passing the three prong *Lemon* test.

Most recent, and perhaps most unique, in this line of cases is *Rivarde v. State of Missouri*, a case which was filed in federal court in July of 1989.[98] In *Rivarde*, the plaintiffs (black families wishing to send their children to private, desegregated schools), seek an amendment to the remedy package ordered by the Eighth Circuit Court of Appeals in the 1988 case of *Jenkins v. State of Missouri*.[99]

In *Jenkins*, the court found that the preponderance of black students in the Kansas City School District was attributable to state and district constitutional violations in maintaining "a dual school system" which in turn precipitated the migration of white students to suburban and private schools. In order to remedy what the court concluded to be unconstitutional remnants of *de jure* segregation, it upheld the lower court's order which included: the allocation of a $260,000 capital improvement plan; the creation of "magnet schools" to attract white students back into the public school system; the placement of some such magnet schools within white neighborhoods in the school district; and the establishment of a voluntary interdistrict transfer (VIT) program, which provided public funding for transportation and tuition costs of minority students desiring to attend a school in another district. The court further upheld a scheme whereby the costs for such remedies were to be borne by the state and the district, such costs being apportioned 75/25% respectively. The court authorized an increase in school district property taxes to implement the plan, but struck down a similar provision which called for a desegregation surcharge on state income tax. The Supreme Court has agreed to hear an appeal challenging the school district tax increase which finances the plan.[100]

Against this backdrop, *Rivarde* adds a "new twist" to the tuition voucher debate, by contending that it is mandated as a desegregation measure which will succeed where the *Jenkins* remedies have failed. Unlike the above cases, the proposed voucher assistance in *Rivarde* would only be available to students currently enrolled in public schools.[101] Proponents of the lawsuit contend that because the relief sought is narrow and directed at remedying a constitutional violation, it will pass muster even in light of the fact that it excludes many categories of students from its benefits.[102]

However, the *Nyguist* case and its progeny seem to suggest otherwise. The critical factor appears to be *neutral availability* of tuition voucher assistance and not merely the type of students who benefit from such programs. Opponents to the remedy sought in *Rivarde* might well argue that by singling out one group of students (i.e., minority public school students), an incentive to attend parochial schools is created. To a certain extent increased enrollment and the resulting influx of state-provided tuition monies would tend to aid the religious missions of such schools in violation of the establishment clause. Additionally, an equal protection challenge might successfully be raised by private school students who are obliged to pay full tuition while their families also pay increased school taxes to fund the program.

The fact that such a program is aimed at correcting a constitutional violation does not, per se, authorize the use of unconstitutional methods to achieve a resolution. Further, the *Jenkins* remedies have been in place for less than two years, and a court might therefore be reluctant to declare such remedies inadequate prematurely and employ additional measures which are at least "constitutionally suspect".

Proponents of *Rivarde* have also been mindful of the "third prong" of the *Lemon* test which prohibits excessive government entanglement in the affairs of private schools. Accordingly, the plaintiffs seek a declaration accompanying such a program to the effect that private institutions shall retain complete autonomy, accepting additional students only as space permits and on a basis which is no more restrictive than that of the city school district.[103] The outcome of *Rivarde* will doubtless have a significant impact on a variety of these issues.

It appears that a tuition voucher or tax credit system at either the state or federal level would be constitutionally permissible, provided: (1) it is available to all students attending public or private schools on a non-discriminatory basis; (2) it does not, in practice, have the primary effect of fostering the religious objectives of private schools; and (3) the system of administration is simple and straightforward, requiring as little governmental intrusion into the affairs of private institutions as possible. The courts are not merely interested in the party to whom the subsidy is paid but rather, the party to whom the benefit ultimately flows. Indeed, public aid in the way of non-religious books, transportation and supplies has been found constitutional because the primary benefit flows directly to the student and not the religious objectives of the institution.[104] While a favorable outcome in *Rivarde* might alter these requirements (at least in the Eighth Circuit), the narrow group of beneficiaries it envisions may prove to be its fatal flaw in light of the establishment and equal protection clauses of the Constitution. Additionally, because of the third *Lemon* requirement (relating to government involvement in the affairs of private institutions), tuition tax credits appear to be the preferred route, having less to do with the private institution than a tuition voucher system would.

CONCLUSION

Clearly, the tension between a desire to aid parochial schools and the first amendment on the federal level, and constitutional provisions and statutes on a state level, is a fertile ground for litigation. The form of the aid may vary as the subject matter of programs changes, but the constitutional mandate to keep the state out of church affairs and the church separate from the state will continue to be the cause of litigation.

(See chart on p. 1-15 which summarizes the constitutional implications of "Public Aid to Private Religious Schools" through August 1985.)

END NOTES

1. *See generally* L. Jorgenson, The State and the Nonpublic School 1825-1925 (1987).

2. *Permoli v. Municipality No. 1*, 44 U.S. 589, 609 (1845).

3. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

4. *Id.* at 303.

5. *Everson v. Board of Education* 330 U.S. 1 (1947).

6. 403 U.S. 602 (1971).

7. *Id.* at 612-13.

8. *Everson*, 330 U.S. at 1.

9. *See* 2 Valente, Education Law Public and Private § 21.134, at 441 (1985).

10. 590 F. Supp. 936 (D. Md. 1984).

11. *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). Both cases involved the denial of unemployment compensation to persons who refused to work on a Sabbath or to perform weapons related work because of religious beliefs.

12. 433 U.S. 229 (1977).

13. *Id.* at 253.

14. *See Members of Jamestown School Comm. v. Schmidt*, 699 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 851 (1983).

15. *Id. See also Americans United for Separation of Church and State v. Benton*, 413 F. Supp. 955 (S.D. Iowa 1975).

16. *Schmidt*, 699 F.2d at 1.

17. *Id.*

18. *Id.* at 9.

19. *Id.* at 10.

20. *Id.*

21. *See Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971).

22. *See Board of Education v. Cronin*, 69 Ill. App.3d 472, 388 N.E.2d 72 (Ill. App. Ct. 1979).

23. *See Rackmyer v. Gates-Chili Central School Dist.*, 48 A.D.2d 180, 368 N.Y.S.2d 636 (4th Dept. 1975); *Eldredge v. Independent School District No. 625*, 422 N.W.2d 319 (Minn. App. 1988), review denied (July 6, 1988).

24. 2 Valente, Education Law Public and Private § 21.134, at 445.

25. 659 F. Supp. 1450 (S.D.N.Y. 1987).

26. 42 U.S.C. §§ 2000e to 2000e-17 (1981 & Supp. 1988).

27. 659 F. Supp. at 1453.

28. *Id.* at 1464.

29. *Id.* at 1468-69.

30. *Id.* at 1471-72.

31. *Id. See also Janasiewicz v. Board of Education*, 299 S.E.2d 34 (W. Va. 1982).

32. 392 U.S. 236 (1968).

33. 421 U.S. 349 (1975).

34. *Id.* at 363-66.

35. 433 U.S. 229 (1977).

36. *Id.* at 251 n.18.

37. *Id.* at 263 (Powell, J., concurring in part and dissenting in part), 265 n.2 (Stevens, J., concurring in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. at 390-91 (Rehnquist, J., concurring in part and dissenting in part).

38. 463 U.S. 388, 402 n.10 (1983).

39. *Fisher v. Regan*, No. 87-119 (N.D.N.Y. filed Feb. 10, 1987).

40. 413 U.S. 455 (1973).

41. *Elbe v. Yankton Indep. School Dist. No. 63-3*, 640 F. Supp. 1234 (D. S.D. 1986). The court relied on the South Dakota Supreme Court's answer to a certified question, in which it followed *McDonald v. Yankton Indep. School Dist. No. 1*, 90 S.D. 599, 246 N.W.2d 93 (1976).

42. *Cunningham v. Lutjeharms*, 231 Neb. 756, 437 N.W.2d 806 (1989).

43. 444 U.S. 646 (1980).

44. 413 U.S. 472 (1973).

45A. *Wolman v. Walter*, 433 U.S.229, (1977).

45B. *Id*. 23-41.

46. 661 F.2d 598, 613-14 (1980).

47. Comprehensive Employment Training Act of 1973, 29 U.S.C. §§ 801 *et seq.* (1985) (repealed 1982).

48. 20 U.S.C.§ 3801 (Supp. 1989) (repealed 1988).

49. 20 U.S.C. § 2727 (Supp. 1989). This is the successor statute to § 557 of the ECIA, which was formerly codified at 20 U.S.C. § 3806.

50. 20 U.S.C. § 2727(b).

51. 20 U.S.C. § 2972 (Supp. 1989). This is derived from § 586 of the ECIA, which was formerly codified at 20 U.S.C. § 3862.

52. D. Levy, Private Education: Studies in Choice and Public Policy 62 (1986).

53. 20 U.S.C. § 2972(c)(2).

54. 20 U.S.C. § 2990 (Supp. 1989).

55. 20 U.S.C. § 3003(d) (Supp. 1989).

56. 20 U.S.C .§ 3066 (Supp. 1989).

57. 20 U.S.C. §§ 3128(a), 3129(b) (Supp. 1989).

58. 20 U.S.C. § 3223 (Supp. 1989).

59. 473 U.S. 373 (1985).

60. *Id.* at 397.

61. 473 U.S. 402 (1985).

62. 598 F. Supp. 1356 (W.D. Mo. 1984).

63. 473 U.S. 922 (1985).

64. 803 F.2d 1235 (2d Cir. 1986).

65. *Pulido v. Bennett*, 848 F.2d 880 (8th Cir. 1988), *same case*, 860 F.2d 296 (8th Cir. 1988).

66. 108 S. Ct. 2562 (1988).

67. *Pulido v. Cavazos*, No. 85-1096-CV-W-8 (W.D. Mo. Dec. 21, 1989). *See also Barnes v. Cavazos*, Civ. Action C80-0501-L(A) (W.D. Ky. Feb. 21, 1990).

68. The payment was $96 for each student teacher per quarter. Three university students had been student teachers at parochial schools.

69. *Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986).

70. 20 U.S.C. §§ 1400-1484 (1978 & Supp. 1989).

71. 34 C.F.R. § 300 (1988).

72. 20 U.S.C. §1413(a)(4)(A); 34 C.F.R. § 300.452.

73. This article does not address (1) liability for tuition payments when a handicapped child is placed in a nonpublic school pursuant to his IEP or (2) liability for tuition payments for a unilateral placement where the placement recommended by the public school is deemed inappropriate and the parental placement appropriate. For a discussion of the latter point, *see Burlington School Comm. v. Department of Educ. of Mass.*, 471 U.S. 359 (1985).

74. 34 C.F.R. § 76.651 (1988). The regulations promulgated pursuant to the EHA incorporate by reference the Education Department General Administrative Regulations (EDGAR) on serving private school children in state administrative programs.

75. 34 C.F.R. § 76.654 (1988).

76. 34 C.F.R. § 76.655 (1988).

77. 34 C.F.R. § 300.348 (1988).

78. OSEP Opinion, March 15, 1988, *EHLR*, EHA Rulings 2 213:125.

79. 473 U.S. 402 (1985).

80. OSEP Opinion, December 14, 1988, *EHLR*, EHA Rulings 2 213:186.

81. OSEP Opinion, November 12, 1985, *EHLR*, EHA Rulings Policy Letters 1978-87 211:372.

82. *Monroe-Woodbury Central School District v. Wieder*. 72 N.Y.2d 174, 531 N.Y.S.2d 889, 527 N.E.2d 767 (1988).

83. 1989 N.Y. Laws, Chapter 748.

84. *See* Syracuse Herald-Journal, July 21, 1989, at B5 (from New York Times News Service).

85. *See* Bruno, *Constitutional Analysis of Educational Vouchers in Minnesota*, 53 Ed. Law. Rep. 9, 10 (June 22, 1989).

86. *See* La. Rev. Stat. Ann. § 47:85 (West Supp. 1989); 19 Minn. Stat. § 290.01, 19b(3) (1989).

87. Bradley, Education Week, April 5, 1989 at 1.

88. *See* Family Education Assistance Act of 1989, H.R. 70.

89. *See* Education Week, April 12, 1989, at 12.

90. *See* New York S-203; Maine S-492.

91. 463 U.S. 388 (1983).

92. At the time that *Mueller* was decided, it was codified at 19 Minn. Stat. § 290.09, 22. It has since been renumbered, and is now found at Minn. Stat. § 290.01, 19b.

93. "Textbooks" includes books and other instructional materials and equipment used in teaching only those subjects legally and commonly taught in public elementary and secondary schools in Minnesota. It does not include materials used in the teaching of religious tenets, doctrines, or worship, for the purpose of instilling such tenets, doctrines, or worship. The deduction also does not cover books or materials for, or transportation to, extracurricular activities.

94. 413 U.S. 756 (1973).

95. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

96. 419 U.S. 825 (1973).

97. *Mueller v. Allen*, 463 U.S. at 388.

98. *See* Snider, *Voucher Plan for Disadvantaged Pursued in Kansas City Lawsuit*, Education Week, August 2, 1989 at 1, 28.

99. *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), *recalled*, 864 F.2d 1454 (1989).

100. *Missouri v. Jenkins*, *cert. granted*, 109 S. Ct. 1930 (1989). Indeed, the *Jenkins* case is by no means settled. A separate group of black plaintiffs has challenged the magnet school program in a separate lawsuit, alleging that the program, in practice, prevents many blacks from gaining admission to such schools because too few whites have applied. Education Week, August 2, 1989 at 1, 28.

101. *See* Snider, *Voucher Plan for Disadvantaged Pursued in Kansas City Lawsuit*, Education Week, August 2, 1989 at 1, 28.

102. *Id.*

103. *Id.*

104. *See, e.g.*, *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Meek v. Pittenger*, 421 U.S. 349 (1975); *Everson v. Board of Education*, 330 U.S. 1 (1947).

National School Boards Association
Center For State Legislation & School Law

Public Aid To Private Religious Schools
Constitutional Implications

		Method of Provision of Benefit				
		Public Employee on Priv. School Property	Public Employee on Public School Property	Public Paid Private Contractor on Private School Property	Direct to Student or Parent	Direct to Private School or Employee
	Type of Benefit Provided					
	Counseling and Diagnostic Aids					
1.2.	Career Counseling	■	□	■	░	□
2.	Speech/hearing diagnostic assistance	□	□	□	□	□
1.	Therapeutic assistance and remedial services	■	□	▨	▧	□
	Courses					
3.4.15	English programs for non-English-speaking children	■	□	■	▧	□
3.4.15	Mobile Learning Centers	■	□	■	▧	□
3.4.15	Preschool training programs	■	□	■	▧	□
5.	Religious instruction	■	■	■	▧	□
	Secular enrichment courses Saturday and during summer Only private students	▨	░	▨	▧	□
	Both private and public students	░	░	░	▧	□
3.4.15	During the regular school week	■	□	■	▧	□
	Secular remedial courses and programs Saturday and during summer Only private students	▨	░	▨	▧	□
	Both private and public students	░	░	░	▧	□
3.4.15	During the regular school week	■	□	■	▧	□
	Summer school and daycamps Only private students	▨	░	▨	▧	□
	Both private and public students	░	░	░	▧	□
	Television programming (from central location not on private school premises)	▧	▧	▧	▧	░
	Curriculum Materials					
	After school study centers	▨	░	▨	▧	□
	Curriculum materials center on public property For use on premises	▧	▧	▧	░	░
	For use off premises	▧	▧	▧	░	▨
	Home oriented bookmobiles	▧	▧	▧	░	□
1.2.	Instructional materials other than textbooks	▧	▧	▧	■	■
	Shop and library facilities	▧	▧	▧	▧	▨
	Textbooks	▧	▧	▧	▧	□
17.	Consumable secular textbooks	▧	▧	▧	▩	▩
7.	Reusable secular textbooks	▧	▧	▧	□	░
	Direct Grants					
12.	Salary supplements for private school teachers	▧	▧	▧	▧	■
	School lunch	▧	▧	▧	▧	░
	Teacher training for private school teachers	▧	▧	▧	▧	▨
8.	Tuition reimbursement grants	▧	▧	▧	■	□
	Vouchers	▧	▧	▧	▩	▩
	Dropout Prevention and other Programs	▧	▧	▧	░	░
	Home and School Visitors Programs	░	░	░	□	□
	Health and Food Programs	░	░	░	▧	□
	Handicapped Children	▨	░	▨	░	□
	Job Training and employment Part-time employment programs in private school	▧	▧	▧	▨	□
	in public school	▧	▧	▧	░	□
	Work experience programs (other than in private school)	▧	▧	▧	░	□
8	**Maintenance and Repair Expenses**	▧	▧	▧	▧	■
	Tax Measures					
10.	Deduction for tuition and other expenses	▧	▧	▧	□	▧
	Tax credit for tuition paid	▧	▧	▧	▩	▧
13.	Tax exemption for private schools	▧	▧	▧	▧	□
8.	"Tax forgiveness" — (deduction not related to amount of tuition paid)	▧	▧	▧	■	▧
	"Release Time"					
6.	Students	▧	▧	▧	□	▧
	Teacher Training and Assistance	▧	▧	▧	▧	▧
12.	Direct grants to private school teachers	▧	▧	▧	▧	■
	Institutes for training teachers	▨	░	▨	▧	▨
	Teacher aides and instructional secretaries	▨	░	▨	▧	▧
	Tests					
16.	Reimbursement Teacher-prepared (private school teacher)	▧	▧	▧	▧	■
11	Reimbursement Standardized	▧	▧	▧	▧	□
	Title I "Equitable Participation" 3.4.15; see also 14.	■	□	■	▧	□
	Transportation					
2.	Extracurricular activities of private school	▧	▧	▧	▧	■
9	Regular classes of private school	▧	▧	▧	▧	□

Table of Cases
1 Meek v. Pittinger, 421 U.S. 349 (1975)
2 Wolman v. Walter, 433 U.S. 229 (1977)
3 Felton v. Aguilar, 53 U.S.L.W. 5013 (July 1, 1985)
4 Grand Rapids v. Ball, 53 U.S.L.W. 5006 (July 1, 1985)
5. McCollum v. Bd of Ed. 333 U.S. 203 (1948)
6. Zorach v. Clauson, 343 U.S. 306 (1952)
7. Bd of Ed v. Allen, 392 U.S. 236 (1968)
8. PEARL v. Nyquist, 413 U.S. 756 (1973)
9. Everson v. Bd of Ed., 330 U.S. 1 (1947)
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Key
Supreme Court Held Unconstitutional	■
Supreme Court Held Constitutional	□
No Supreme Court Ruling Directly in Point	
Probably Unconstitutional	▨
Probably Constitutional	░
No Opinion	▩
Not Applicable	▧

An Analysis of the Expansion of Free Exercise and Establishment Clause Challenges to Curriculum and Instructional Practices in the Public Schools

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INTRODUCTION

In recent years, national attention has focused on the issue of whether public school districts must accommodate the religious-based objections of parents to school curriculums and textbooks. This discussion will focus on the impact of two federal court cases; namely, *Mozert v. Hawkins County Public Schools,*[1] commonly referred to as the "Tennessee textbook case," and *Smith v. Board of School Commissioners*[2] commonly referred to as the "Alabama textbook case." In addition, pertinent cases and vignettes from the perspective of the school board member and school administrator are discussed, focusing on who is responsible for curriculum development and administration at the local level and who is asked to accommodate religious objections. Challenges to curriculum have encouraged related challenges upon instructional materials and practices as well as library materials.

The analysis is an anecdotal rather than comprehensive treatment of these important issues that school boards must face with ever increasing frequency. This proliferation of religious challenges to curriculum and instructional practices has considerable potential for splintering integrated curriculums carefully developed to allow instruction in one subject to reinforce and expand upon related instruction and skills from other subject areas. The piecemeal curriculum remaining after a successful challenge to materials or instructional methods has the potential to compromise the effectiveness of the public schools in teaching critical thinking skills in preparation for citizenship in a democratic society.

The question of whether such accommodations can be made by public schools without, at the same time, gravely compromising the diversity, structure and independence of local school boards is left to the reader. Parties to this emotionally intense litigation have been represented by national organizations who have clearly stated political agendas reaching beyond the nature of the curriculum or instruction in the plaintiffs' public schools.

THE TEXTBOOK CASES

The Tennessee Textbook Case

In the Tennessee textbook case,[3] certain parents, represented by Beverly LaHaye's national organization, "Concerned Women of America," did not attempt to ban textbooks. Instead, they requested that their children not be *exposed* to certain reading materials which they claimed to be objectionable to their religious beliefs.

The parents asserted that they did not want their children reading from the Holt Rinehart and Winston basal reading series textbooks, nor did they want them present in the classroom when the objectionable material was read aloud or discussed. They presented a sweeping list of broadly based religious objections to the reading curriculum.

The parents objected to the teaching of critical thinking skills, to the exposure of their children to the feelings, attitudes and values of other students when the views expressed were contrary to parental views, and to the exposure of their children to material encouraging religious tolerance or making one's own moral judgments. In particular, the parents objected to *The Diary of Anne Frank,* asserting that the book teaches that one religion is as good as another. To the objecting parents, this was repugnant, as they viewed all religions besides their own as false. They objected to teaching children to have a sense of themselves as individuals and participants in a national or world community, and thus objected to any emphasis on opposition to war, disarmament, pollution, world population, hunger, conservation of resources, endangered species, gun control, abortion, the role of the military, law enforcement, and the future of the human race. They also objected to having their children exposed to material portraying men and women in nontraditional sex roles. They further objected to many fairy tales and folk tales and well-known children's literature, including "Rumpelstiltskin" and "The Wizard of Oz." In short, world views inconsistent with their own were objectionable as interfering with their free exercise of religion.

Curiously, the parents did not object to the material taught in other school subjects, despite the fact that many of the objectionable themes were found in the curriculum and materials of other subjects.

When the students refused, on religious grounds, to read the Holt series or to attend the reading classes, they were suspended from school, and filed suit against in the district. The district's legal fees were paid by the national organization of television producer Norman Lear, based in Washington, D.C., "People For the American Way."

The United States District Court for the Eastern District of Tennessee, the Honorable Thomas G. Hull presiding, enjoined the school board from requiring the students to read from the Holt series, and ordered that the students attend the public schools without participating in the objectionable reading instruction. The court held that:

> [a] reasonable alternative which could accommodate the [student's] religious beliefs, effectuate the state's interest in education, and avoid Establishment Clause problems, would be to allow the students to opt out of the school district's reading program.[4]

Under this opt-out program, each student would withdraw to a study hall or library during the regular reading period and would study reading with a parent at home. The court held that its opinion was not to be interpreted to require the school system to make this option available to any other person or these students for any other subject.

The court further determined that the individual defendants were protected from financial liability to the plaintiffs on the basis of their qualified good faith immunity, but nevertheless awarded the plaintiffs over $50,000 in damages against the school board as compensation for alternative educational arrangements.[5] In most cases, this meant nonpublic religious school education.[6] The district appealed the decision to the United States Court of Appeals for the Sixth Circuit.

Educators across the nation feared that an affirmance of the lower court's decision would encourage anyone with religious objections to the public school curriculum to commence similar litigation against their public school district.[7]

Appellant Hawkins County Public Schools and various *amici* argued that if the decision was affirmed, school districts across the nation would be adversely affected. If students had the right to opt out of any part of the curriculum and to object to mere exposure to class discussions in which the alternative viewpoints are expressed, schools would be precluded from meeting the educational objective of teaching an understanding and acceptance of others as members of a pluralistic society. Furthermore, it was argued that schools would be precluded from ensuring that all students are taught to think critically, logically and creatively, and to apply reasoning to issues and problems in all subjects at all grade levels.

In Tennessee, as in many other states, parents have a right to educate their children at home, subject to certain limitations, as well as the right to send their children to private schools. Providing children with the opportunity to opt out of parts of the core curriculum, *amici* asserted, placed a greater burden on the public school system than the alternative of providing private school or home schooling. Since Tennessee students remained part of the public education system, the school board remained obligated to meet the state educational objectives for the portion of the curriculum from which the objecting students were released. Furthermore, since the students were primarily elementary school children, their placement in a study hall during reading instruction would not have been the logistically uncomplicated proposition suggested by the district court.

Amici argued that the parents' objections were incompatible with the philosophy of public education and inconsistent with generally accepted methods of teaching reading. Educators encourage students to consider moral questions, to think critically, to make independent moral judgments, to function as autonomous individuals who can make their own judgments about moral questions. Reading curricula teach far more than the skills of word recognition and phonics. Although the plaintiffs in *Mozert* argued that the reading curriculum could be taught in a vacuum, *amici* argued that an effective reading curriculum is part of an integrated instructional program. Often material introduced as part of the reading lesson is reinforced as part of the curriculum of another subject. Although at first glance, the proposed opt-out program might appear to have had minimal adverse effect, *amici* in *Mozert* pointed out that upon closer examination, the option was not educationally sound.

Jerome S. Bruner, a renowned educator and author of numerous educational books and articles, refers to the linking of subjects in our public educational system as the "spiral curriculum." Under a spiral curriculum, students acquire skills and knowledge in their reading programs which enable them to gain an understanding of their science and mathematics programs. Furthermore, students learn certain skills in each subject matter which are later reinforced and expanded in the same subject matter at higher grade levels as the student becomes more sophisticated. This is known as "sequencing."

The effect of "opt-out" is not limited to the child's learning in one particular course of instruction. Rather, there will be an effect upon the student's learning in both present and future coursework. As a result, in order to truly accommodate the student and provide equal educational opportunity, public school districts faced with an opt-out court order will have little alternative but to abandon their spiral curricula or interdisciplinary learning processes. More importantly, if public educators are forced to abandon educational theories and techniques upon which our present educational system is founded, the quality of public education will suffer. Teachers presently striving to maintain the momentum toward improving the quality of education while individualizing instruction to meet the needs of at-risk students would be asked to develop individual plans for every child. Since this is not feasible, the education of the pupils will suffer.

Another detriment of the opt-out system is that educators would no longer be able to track equally the performance of all students in a particular class. Since students who are allowed to opt out would not be acquiring critical thinking skills, schools would need to establish differential academic standards to evaluate opt-out students. The more students opting out, the greater the likelihood that schools would have to compromise still further academic standards utilized to assess student performance. Moreover, the learning environment for the opt-out student's group would be less heterogeneous.

Schools cannot be held to state-mandated educational objectives if students are permitted to opt out of objectionable parts of the core curriculum. Contemporary public education stresses a renewed emphasis upon the teaching of values in public schools. If a parent objects to the values implicit in public school curriculum, but nevertheless chooses to send his child to the public schools, it is virtually impossible to accommodate his objection and simultaneously fulfill state and local educational mandates.

The district court in *Mozert* did not anticipate these concerns and focused only upon the Hawkins County public schools in balancing the district's educational concerns and parental requests for religious accommodation. The court held that since Hawkins county was a "religiously homogeneous community," accommodating parents was not too onerous.[8] The court expressed doubt that its decision would serve as an invitation to parents to sue their school boards for an opt-out remedy and damages.[9]

Nevertheless, the *Mozert* court purported to establish a brand of freedom of religion dependent upon the local geography and the homogeneous nature of the community, i.e., a geographically variable first amendment. Because the first amendment grants all individuals freedom of religion, entitlement cannot turn upon whether the pupil's school district of residence has a homogeneous religious population.

The United States Court of Appeals for the Sixth Circuit, with Chief Judge Lively writing for the majority, reversed the district court, holding that parents and children could not successfully claim that their freedom to practice their religion had been violated by the school district's mandating attendance and exposure to the Holt books when they are not required to "affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion."[10] The court reasoned that the right to practice one's religion is not burdened simply by requiring one to be exposed to disagreeable ideas.

The petition for certiorari filed with the United States Supreme Court was denied.[11]

The Alabama Textbook Case

In the Alabama textbook case,[12] certain parents had been successful in convincing a federal judge to ban 44 history, social studies and home economics textbooks from use in Alabama public schools, despite their status on the state's officially approved list of textbooks.

Plaintiffs challenged home economics texts as teaching that values come from within oneself and not from God. As a result, they argued, children were taught the "secular humanistic" idea that man should be elevated at the expense of God. Plaintiffs alleged that because history and social studies texts consistently excluded facts about religion, they taught that religion was irrelevant and unimportant. They claimed that this exclusion inhibited Christianity, discriminated against theistic religion, violated a constitutional bar against government disapproval of religion, and violated Alabama law.

On March 4, 1987, Judge Brevard Hand held that certain of the challenged textbooks violated the establishment clause because the books espoused "Secular Humanism." The court agreed with plaintiffs that the religion of "Secular Humanism" existed, with the central tenet of elevating man at the expense of God. It ordered the texts removed from the state-adopted textbook list and prohibited the furnishing of the listed textbooks to state schools.[13]

When an appeal was filed with the Eleventh Circuit, *amicus curiae* participation was solicited.[14] Many saw this decision as another direct threat to public education, as parents asked not only that their children be excluded from participation in certain courses, but, in addition, received additional judicial relief in the form of book banning.

Public educators saw this case as presenting a threat to the authority of school boards to make curriculum development decisions. Plaintiffs negotiated to exhaust administrative remedies by utilizing procedures permitting parent and citizen involvement in the Alabama textbook selection process.

Alabama asserted that the textbooks neither espoused religion nor inhibited theistic religion. Thus, the textbooks did not necessarily reflect the teachings of the "Secular Humanist" movement, but rather an eclectic approach of textbook publishing companies so as to respond to the influences of various interest groups in society and thereby promote greater book sales. The state argued that even if plaintiffs' premise that the books inaccurately reported history and were "bad" books had been correct, it did not necessarily follow that they were unconstitutional so as to require judicially imposed removal.

Under plaintiffs' analysis, neutrality toward religion is impossible because everything is either for or against theistic religion. Even silence connotes a message of disapproval. *Amici* argued that such a stance rendered the religion clauses of the first amendment meaningless and unworkable. The establishment clause precisely mandates government neutrality toward religion.

Plaintiffs had clearly articulated their objection to exposure to any textbooks which provided exposure to ideas different from their own religious beliefs. They opposed critical thinking due to the potential for encouraging their children to question their own religious beliefs. In this respect, the objections of the parents were very similar to the parents' objections in *Mozert*, despite Judge Hand's determination that the Alabama case was "fundamentally different from *Mozert*."

Appellants did not accept the assertion that a public school district's presentation of choices to its students inhibits their practice of religion, stating that even if there is some inhibitory effect, such individuals are not entitled to judicial protection under the establishment clause.

Since the plaintiffs' objections to the textbooks were based on general principles of constitutional law, religious objectors to the public school curriculum would likely view Judge Hand's decision as encouragement to seek judicial relief without the necessity of exhausting state administrative remedies. To allow this circumvention of the role of local school boards to respond and/or redress curriculum objections would set up the courts as arbiters of curriculum.

Widespread application of this result would have a further dramatic effect upon states such as New York, composed of a large population of individuals of diverse beliefs, as the ruling could open the door for attacks on the public schools.

On appeal, the district court's decision was reversed. Judge Johnson, writing for the majority, did not reach the question of whether "Secular Humanism" is a religion, holding that the court's decision would be the same regardless of the result.

The court observed that while some of the material may be religiously offensive, the state's purpose in instilling in Alabama public school children values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance, and logical decision-making, outweighed any possible interference with the religious rights of the parties. The court stated that if schools are precluded from including material in books that is offensive to any particular religious belief, "there would be very little that could be taught in the public schools."[15] With respect to the history books, the court observed that by a mere omission of historical facts, the state does not discriminate against religion.[16]

The case was not appealed to the United States Supreme Court. It was feared that if the case were to be reversed, such a reversal would adversely impact states such as New York where there is no central textbook list compiled by the state and where each board of education selects textbooks. Such jurisdictions would thus prove fertile ground for textbook challenges.

Amici further feared that a reversal would effectively preclude *all* public school districts from providing students with the tools needed to think critically, because districts would be mandated to present only one position, that of the plaintiffs. If school boards did not agree to remove textbooks which were objected to on religious grounds, individual board members would risk personal liability for monetary damages under civil rights lawsuits. This would produce a chilling effect upon school boards in carrying out their legal responsibilities of developing curriculum.

NEW YORK: RELIGIOUS ACCOMMODATION CASES BASED ON CHALLENGES TO DELIVERY OF SERVICES, CURRICULUM OR STATE REGULATION OF HOME INSTRUCTION

Weider: The Establishment of Quasi-Religious Public School Services

Another case in which individuals claimed violation of religious freedom is entitled *Board of Education v. Wieder,*[17] recently decided by a New York state appellate court. Certain Satmar Hasidic parents, living in the village of Kiryas Joel outside of New York City, claimed an absolute right for their handicapped children, who were enrolled in religious schools, to receive special education and remedial services from the public school district in alternate sites, away from the premises of their public school district. The parents refused to allow their children to be exposed to children who were not members of their own religious community and, consequently, refused to allow their children to receive these services in the public schools. The parents demanded that their children receive these services at alternate sites such as mini-vans where no other individuals besides members of their own religious community were present. They were successful in a lower state court.[18]

The New York State School Boards Association, as *amici,* on appeal from the lower court's decision, argued that the right of the handicapped children to receive these services from the public school, was not absolute. Parents should not be able to demand that the school provide the disputed services to their children in mini-vans which exclude all individuals not members of the children's religious community as this is a school sanction and establishment of moving religious institutions. This would effectively sanction religious intolerance, and violate the constitutional separation of church and state. The state appellate court ultimately ruled that the public school was not required to provide the services at such "neutral" sites.

As a footnote to this decision, on July 25, 1989, New York State Governor Mario Cuomo signed a bill into law which established a separate school district in and for the Hasidic village of Kiryas Joel.[19] This allows this new school district to offer special education services to handicapped Hasidic children. The constitutionality of the law is questionable in that it can be argued that the new publicly funded district was set up to advance the religious precepts of separation by the Satmar religious sect. Litigation on this issue is anticipated in the future.

A Challenge to New York State's Home Instruction Law: Blackwelder

The culmination of parental challenges to public school curriculum has been the home schooling movement. Parents seek to educate their children at home for reasons ranging from religious objections to the curricula presented in the public schools to basic pedagogical differences with the present educational system. When, in the view of such parents, their "right" to educate their children at home is interfered with, either by state legislation or by public school officials, litigation has followed.

Parents have generally challenged the application of state compulsory education laws to their home schools. Such laws establish minimum requirements for parents to meet in order either to commence or to continue home instruction. Parents have claimed that their states have effectively precluded them from exercising their "right" to educate their children at home.

Blackwelder v. Safnauer,[20] filed in the District Court for the Northern District of New York, is illustrative of the legal issues raised by home instruction.

The Constitution and the Right to Home-Instruction

Individuals who educate their children at home, based upon religious motivations, believe that the right of a parent to teach his or her child at home is protected by the free exercise clause of the first amendment to the Constitution of the United States. This clause states that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[21] They claim that state compulsory education statutes unconstitutionally mandate regulation of their home school programs and require them to accept principles and philosophies of the public educational system, thereby infringing upon their free exercise of religious beliefs, in violation of the federal and state constitutions.

Schools and state education departments who defend such actions assert that the free exercise clause rights of such individuals have not been violated and that in balancing the parental right to practice religion against the compelling interest of the state to mandate a certain minimum level of education for every child in the state, including home school children, the scale tips in favor of the state.

Facial Validity and Application of New York State's Compulsory Education Statute

The legal arguments in *Blackwelder* are typical of other home school cases throughout the nation. In *Blackwelder,* parents who desired to educate their children at home commenced a federal action against their local school district claiming in part that New York State's Compulsory Education Law[22] was unconstitutional both on its face and as applied. The statute in question requires in part that,

> instruction may be given only by a competent teacher . . . [and that] [i]nstructions given to a minor "elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides . . . ."[23]

Parents claimed that the law itself was unconstitutionally void for vagueness in that it fails to define "competent teacher" or "substantially equivalent instruction" in a manner that would adequately inform either parents or school officials charged with the enforcement of the statute as to the meaning of the term. Parents claimed that local school districts were enforcing the law with a vengeance, imposing unreasonable conditions upon home instruction.

The parents asserted that it was unconstitutional for local districts to require that all home instruction programs receive district approval prior to commencing operation. They argued that the approval requirement was a precondition to home schooling that violated their free exercise of religion and the right to raise children according to their own moral precepts. The parents asserted that formal government approval of religious education violated the establishment clause of the United States Constitution which provides that "Congress shall make no law respecting an establishment of religion . . ."[24]

Additionally, the parents asserted that because the statute was unconstitutionally vague, local districts applied it in an unconstitutional manner in determining whether home instruction programs were substantially equivalent to that of the local school district. The parents argued that state law was vague, thus local schools had no specific statutory guidelines in reviewing home schools for substantial equivalency of instruction. The parents asserted that the New York State Education Department's *Guidelines on Home Instruction* were advisory only and not legally enforceable.

The parents further argued that the fourth amendment right to be free from unreasonable searches and seizures was violated by uncontrolled and unauthorized home visits by local school superintendents who conducted such visits to determine whether their home school programs were substantially equivalent to that of the local public school. The parents alleged that their local school superintendent could not require them to provide home school materials for district inspection (e.g., textbooks, curricula) and that their free exercise clause rights were violated when public school officials exercised discretionary control over private religious education.

Finally, the parents claimed that since public school districts receive state funding for public school enrollment, superintendents have a financial interest in generating as much funding as possible by increasing the public schools enrollment. As a result, the parents argued, superintendents are inclined automatically to find that equivalency of instruction does not exist in the home setting, thereby assuring the school district of additional students. The parents reasoned that this state law required a due process decision by a person without "financial stake" in the outcome.

The local school districts, intervenor New York State Education Department, *amici* New York State School Boards Association, and the New York State Teachers' Association argued that the parents had failed to demonstrate that New York's compulsory education law was unconstitutional either on its face or as applied.

Defendants noted that the compulsory education law contains no prohibition against the instruction of children at home and that the parents were free to do so. However, the defendants asserted, in order to assure that each child in New York has an equal chance to receive an education, parents who wish to educate their children at home must first comply with state requirements. Defendants argued that the New York law was part of a comprehensive statutory scheme for ensuring all children the opportunity to receive an education and, when analyzed in its entirety, the legislative scheme was neither unconstitutionally vague nor ambiguous.

Defendants noted that to grant the requested relief would exempt the home schools from the compulsory education law without first demonstrating that they qualified for such an exemption. Defendants argued that the parents did not qualify for such an exemption because, unlike the Amish community in *Wisconsin v. Yoder*,[25] the state has a compelling interest in determining whether children withheld from school on religious grounds were receiving any education whatsoever.

Defendants argued that while freedom of individual belief is absolute, freedom of individual conduct is not.[26] Thus, the state may limit conduct grounded in religious beliefs where essential to accomplish an overriding governmental interest, irrespective of the substantial impact of such regulation upon the practice of religion.[27] While an attempt should always be made to accommodate religious beliefs, argued the defendants, when the accommodation radically restricts legitimate governmental action, no further accommodation is required.[28]

Defendants observed that although no formal regulations had been promulgated governing at-home instruction, the New York State Department of Education had issued *Guidelines on Home Instruction*[29] that set forth recommendations for schools regarding the determination of substantial equivalency of the home school to the public school. Defendants argued that these *Guidelines* were legally enforceable, despite the fact that they had not been adopted by the legislature or the state board of education. Defendants asserted that while districts were not required to follow the *Guidelines*, they were not free to ignore them. Furthermore, the *Guidelines* set forth clear, concise and constitutional standards.

Defendants asserted that there was no merit to the parents' allegations that the term "competent" instructor was vague, as the meaning could be readily determined by reference to decisional law and inquiry to school officials as to the criteria they would apply. New York, unlike many other states, does not require home schooling parents to possess formal qualifications or certification.[30] Thus, the requirement of "competency" was not too onerous. What is essential, asserted defendants, is that the individual administering the home instruction demonstrate systematic planning and delivery of the daily curriculum, consistent quality of instruction in required subject areas, instruction in all required areas, and a showing that the instruction attempts to apply the curriculum of the local board of education.[31]

Defendants asserted that there was no basis for the parents' vagueness challenge to the statutory standard of "substantial equivalence" as substantial equivalence can be objectively measured. The state requirements of "teacher competency" and "substantial equivalence" were not vague, but flexible, and it is essential to the opportunity of parents to educate children at home that flexibility be part of the enforcement scheme.

Defendants argued that state-aid dollars for enrollment were supplemented by local school districts in order to provide adequate education. Thus, the parents' argument that superintendents had a financial incentive to drive home-instructed children back to public schools was fallacious.

On the issue of whether home visits constitute unlawful search and seizure, defendants argued that even if privacy interests were somehow minimally invaded, the compelling state interest in protecting the educational interests of the children was more important than the parental right of privacy.

In summary, defendants contended that parental free exercise rights were not violated by the enforcement of the state compulsory education law. Defendants asserted that the requirement of school district review of the home schooling program was not unconstitutional because the state has an obligation to defend against parental abuse of the right to home schooling. Defendants cited the case of *Maine v. McDonough*[32] for the proposition that:

> [f]or the state to allow home education without imposing some standards as to quality and duration would be, in many cases, to allow parents to deprive their children of any education whatsoever. [W]here a state provides reasonable procedures for home instruction, parents may not ignore these procedures and then appeal to a court claiming that their rights have been denied.[33]

On June 16, 1988, United States District Court Judge Howard Munson handed down a 91-page decision in *Blackwelder* in favor of the defendant school districts, finding that the state compulsory education law was constitutional. The court reserved judgment on the issue of whether the United States Constitution affords parents the constitutional right of home schooling. The court did, however, recognize the statutory right, under state law, for at-home instruction. It upheld the right of local school boards to ensure compliance with the compulsory education law. The court found the terms "substantial equivalency" and "competency of instruction" to be neither vague nor ambiguous. Likewise, the court found no violation of parental rights to practice religion by enforcement of the state law. The court cited the Supreme Court's landmark decision in *Brown v. Board of Education*[34] in support of its holding that "when a child lacking the maturity and experience to make an independent judgment concerning the course of his educational future is denied the paramount privilege of an education which meets basic minimum standards, a compelling state interest is implicated."[35]

Unlike the Amish in *Yoder*, the children in the *Blackwelder* case must live, work, and function in modern society upon reaching maturity. The court would not grant them an exemption from the compulsory education law.

The court held that the actions of the districts in enforcing the compulsory education law were reasonable and were justified by the state interest in assuring all children an education. It rejected fourth amendment unlawful search and seizure claims along with the argument that enforcement of the state law placed the imprimatur of government upon religious education in violation of the establishment clause. Finally, the court rejected the parental assertion that superintendents were biased decision makers, and granted summary judgment to defendant school districts.

An appeal of the *Blackwelder* case was taken to the United States Court of Appeals for the Second Circuit, which refused to vacate the district court's decision.[36] The parents asserted on appeal that after the district court's decision, a change in the law had been effectuated by promulgation of new legally binding regulations on home instruction by the New York State Board of Regents. The parents claimed that the new regulations had so changed the state of the law, that the trial court's decision should be vacated as moot because the holding was based upon a body of law which no longer existed.

The Second Circuit rejected these contentions and held that the new regulations did *not* effect a change in the compulsory education law challenged in *Blackwelder*. The court held that the new regulations enforced the already existing compulsory education law. The parents did not appeal the Second Circuit's decision to the United States Supreme Court.

New York regulations mandate that parents who wish to participate in home schooling must annually submit to their local districts an individualized home instruction plan (IHIP) outlining educational goals, course materials and syllabi for their child's instruction. The regulations assign specific time requirements, and require districts either to accept or to deny the plan. If the plan is accepted, parents must submit quarterly reports to the districts with sufficient information to determine substantial equivalency and competency of instruction on an ongoing basis. The regulations provide for an annual assessment consisting, in part, of standardized exams designed to assess whether the child has fulfilled all of the requirements of the compulsory education law for the school year. The regulations set up a detailed system of probation for the home schooling programs. Non-compliant home school programs are entitled to appeal via detailed due process proceedings to the State Commissioner of Education.

The New York regulations are broader, more comprehensive and more stringent than home schooling regulations of other states. Rights of parents and obligations of school districts are clearly recognized and protected by the New York regulations. Only the passage of time will tell whether the problems which at-home instruction has brought in New York State have truly been solved. The issues raised by the New York cases have considerable potential impact upon our system of public education. They reaffirm the importance of preserving the rights of the local school board to determine educational curriculum and the necessity of deference by the courts to allow plenary exercise of school board responsibilities.

Mandated Representation of the Religious Community on Local Advisory Councils as an Unconstitutional Establishment of Religion

Most recently, the New York State School Boards Association (Association) filed a lawsuit against the New York State Board of Regents as well as the New York State Commissioner of Education contesting the adoption of regulations which require that all public schools in the state establish an advisory council responsible for making recommendations concerning an AIDS instruction program. This regulation provides that "[t]he advisory council shall consist of parents, school board members, appropriate school personnel, and community representatives, *including a representative from religious organizations.*"

In this lawsuit, the Association asserts that the state mandate violates the prescribed constitutional separation of church and state, and places school districts in the untenable position of facing one or more types of challenges on religious grounds. An establishment clause challenge may be made on the ground that the school board, in making such appointments has violated the establishment clause. In the alternative, if local boards do not make the appointments, they may anticipate legal enforcement action from the state department of education. The Association further contends that the mandate to appoint members of religious organizations on AIDS advisory councils, excessively entangles schools in matters of religion, as they are placed in the position of having to determine which particular religious organization and viewpoints should be represented, and which members of religious organizations should be appointed to such committees. As a result, the Association argues, the regulation has the unconstitutional effect of violating the separation of church and state.

The Association also asserts that the regulation will place school boards in the position of offending certain members of the community whose religious viewpoints do not gain representation on the advisory council. Such community members will undoubtedly be disheartened to find that selective religious viewpoints acknowledged by their local board of education. In order to achieve a balance of all of the religious interests in their community, Association asserts, school boards will become excessively entangled in matters of religion. Such a requirement is not only violative of the establishment clause, but also has a most divisive impact upon New York school districts in that the New York religious community is extremely diverse.

For this reason, the Association has brought an action in state court, requesting a declaratory judgment to determine the constitutionality of the regulation. The lawsuit, does not raise philosophical objections to school boards' appointment of religious representatives on advisory councils, but rather, contests the state mandate to make such appointment on constitutional grounds.

CALIFORNIA AND THE NINTH CIRCUIT: REPRESENTATIVE EXAMPLES OF ESTABLISHMENT AND FREE EXERCISE CLAUSE CHALLENGES TO CURRICULUM, INSTRUCTIONAL MATERIALS, AND INSTRUCTIONAL PRACTICES

School boards and their lawyers are accustomed to curriculum and instructional material challenges on the basis that the practice or the material constitutes an unlawful establishment of religion or an affront to religious beliefs and therefore a limitation on free exercise of religion. At first blush, it appears that the guidance provided by decisions of the U.S. Supreme Court in recent decades would suffice to minimize alleged violations of constitutional rights under the free exercise and establishment clauses. However, in the authors' experience, the opposite has been true. Parents and community members now more than ever readily assert objections to curriculum and instructional practices on religious grounds at the local school board level. Open meeting guarantees in state law and supplemental individual protections of state constitutions give rise to additional challenges on religious grounds. Often, these challenges inspire an impending sense of deja vu, as fervently religious parents and their supporters are only too eager to re-wage battles already litigated to resolution by the courts.

The following brief anecdotes teach that school board members and administrators must ask themselves, with respect to virtually every curriculum decision, whether it is susceptible to challenge on the grounds that there is unlawful coercion, whether there has been an unconstitutional establishment of or preference for religion effected by the decision, and whether the strict neutrality requirement as defined by the U.S. Supreme Court in *Lemon v. Kurtzman*[37] has been satisfied. Community members have continued to demonstrate their enthusiasm for challenging the authority of school board members and administrators in public meetings in the local press, and in the courts, as typified by the following examples.

Does The Presence of a Ouija Board in a Fifth Grade Classroom Constitute an Unlawful Establishment of Religion?

A large California elementary school district recently received a curriculum challenge by community members to the presence of a ouija board in a combination fifth/sixth grade classroom. The teacher had provided the ouija board, together with a number of other board games, for free choice activities during rainy day recess. Obviously, the ouija board was neither an instructional material contained within the state curriculum matrix, nor a district-approved supplemental instructional tool. During the 1985-86 school year, the ouija board was used during rainy day recess without comment or objection, however, in the subsequent school year, key community members articulated a challenge to the presence of the ouija board under the district's curriculum review policy, demanding its immediate removal on the basis as an unconstitutional establishment of the occult as a religion.

The instructor objected, asserting his right to supplement district-adopted materials with teacher-provided and teacher-made materials, and alleging unlawful censorship in violation of his academic freedom and the first amendment. School board members and the administrators were deluged with calls and correspondence objecting to the activity. As often happens in establishment clause and free exercise challenges to school activities or curriculum, the leaders of the challenge were concerned community members who did not have children enrolled in district schools. Under the board-adopted procedure for receipt of challenges to instructional practices or materials, the district convened a review committee.

The committee, composed of the school principal, a teacher, and a reading specialist, held five public hearings wherein it heard 27 presenters and received 500 pages of written comments. Issues formulated by the committee for review were as follows:

- Is there redeeming educational value in the material under review?

- Will removing the material or allowing it to remain have a negative effect on the instructional program?
- Is the material under review an item of the occult?
- Is it sufficient to allow children to use or not to use the material by written parental decision?

The committee found "little redeeming educational value" in the material under review, observing that it had been used in the 1986-87 school year on one occasion for less than 10 minutes. Both the principal and teacher had monitored use of the ouija board to ensure that only students with parent permission participated. The committee determined that whether the ouija board was removed or not, there would be little negative or positive effect upon the instructional program, and that the opinions and case histories offered by those who believed that the ouija board was an item of the supernatural, as well as the comments by their opponents, were anecdotal in nature, and unverified by empirical research data. It therefore declined to make a judgment on the issue of whether the ouija board constituted an item of the occult. The committee relied upon state law guaranteeing students the right to freedom of expression in determining that students should have a degree of choice in selecting free time activities, so long as the materials were not clearly educationally inappropriate or prohibited by law. The committee suggested that teachers, in selecting free time materials, consider appropriateness of the material, the maturity and age level of students, whether the material had educational or entertainment value, whether student activities and behavior during use of the material would be consistent with district standards, whether the free choice activities provided allow for sufficient choice among a variety of activities, including materials which would allow students to exercise their kinesthetic, cognitive, and decision-making skills, and whether the materials themselves might be considered controversial in nature. The committee determined to leave to the individual teacher's professional judgment the selection of materials for rainy day recess.

The committee conducted a considerable amount of research as to legal precedents for parental objections. It ultimately declined to recommend removal of the ouija board, observing that parents were advised of the availability of the ouija board, and given an opportunity to request that their students not participate in its use.

As authority for its decision, the committee relied upon a California case brought by parents appealing the presentation of family life information in the public schools, *Citizens for Parental Rights v. San Mateo County*[38] wherein the court held:

> As so well stated by the court below in its excellent and well reasoned memorandum opinion: "Absent some serious contention of harm to the mental or physical health of the children of this state, or to the public safety, peace, order, or welfare, a mere personal difference of opinion as to the curriculum which is taught in our public school system does not give rise to a constitutional right in the private citizen to control exposure to knowledge."[39]

The committee recognized that individuals are entitled to raise religious objections, but not to impose their personal religious beliefs upon the children of others. The school board chose the opt-out remedy, rejecting the request of complainants to remove the activity. The committee's recommendation to the board further relied upon the decision of the California Court of Appeal in *San Mateo,* wherein the court stated:

As previously pointed out, the students are not compelled to attend any part of the program and if there is parental objection, may summarily withdraw from any part or the entire program. The Constitution of the United States does not vest in objectors the right to preclude other students who may voluntarily desire to participate in a course of study under the guise that the objector's, liberty, personal happiness, or parental authority is somehow jeopardized or impaired. To adhere to such a concept would use judicial constitutional authority to limit inquiry to conformity, and to limit knowledge to the known.[40]

The committee found neither the coercion contemplated in the case of violation of the free exercise clause, nor the establishment of the occult as a religion. Threatened litigation and the cameras of CNN and nationwide television coverage notwithstanding, the complainants did not challenge the committee's recommendation nor the school board's decision in court.

How the Grinch (Almost) Stole Christmas: Traditional Christmas Carols as an Unconstitutional Establishment of Religion

Recently, a southern California school board received a complaint from a member of a local school site community/parent advisory council because the December, 1988 Christmas program of the local elementary school had been entitled, "Holiday Fair". The citizen complained that the word "Christmas" had been taken out of the title of the program. Opposing council members countered that the singing of the traditional Christmas carols, "Away in a Manger" and "Silent Night" constituted an impermissible establishment of religion. The first, second, and third grade students in the program also sang "We Wish You a Merry Christmas," "It's Beginning to Look Like Christmas," "Deck the Halls," "Rudolph the Red-Nosed Reindeer," and "Frosty, the Snowman." The local controversy escalated from school site discussion to formal complaints and threatened litigation, leading the local school board to closely scrutinize district traditional holiday observances.

In making a determination that: (1) the word, "Christmas", had acquired a secular significance, and therefore could be used or not, at the option of the board, and that (2) the singing of certain traditional carols did not constitute an unlawful establishment of religion, the governing board relied upon the experience of the school district in *Florey v. Sioux Falls School District.*[41]

In *Florey,* the district received complaints that certain Christmas celebrations in the public schools contained religious exercises constituting an unlawful establishment of religion. The court applied the three-part *Lemon* test, concluding that the carols written by well-known choral composers had achieved a cultural significance justifying the singing of the carols in public schools, and finding that such carols had a secular purpose of advancing the student's knowledge of society's cultural and religious heritage. Under the second prong of the *Lemon* test, the *Florey* court found that the district's rules did not have the primary effect of advancing religion, distinguishing between the teaching *of* religion and teaching *about* religion, nor did it find excessive entanglement by the singing of the traditional religious carols, interspersed with secular carols.

The school board was determined to avoid more modern, nontraditional carols with religious references, since these could not be determined to have achieved a cultural significance for purposes of use as religious literature, art, or music, and thus could not clearly be held to be part of our national cultural and religious heritage.[42]

Is Release Time for Religious Instruction an Unconstitutional Establishment of Religion?

A number of states, including California, have allowed local school boards to adopt a policy wherein pupils, with the written consent of parents, may be excused from school in order to participate in religious exercises or instruction at a designated location away from school property. In California, the pupil must attend the minimum school day for his/her grade level, and such excusal may not occur on more than four school days per month.[43] The California Court of Appeal in *Gordon v. Board of Education of the City of Los Angeles,*[44] held that such release time for religious instruction violated neither the federal nor the California Constitutions, and the California Supreme Court refused to grant review.

Several years later, the U.S. Supreme Court in *Zorach v. Clauson*[45] held that public schools may permit the release of students during school hours for attendance at religious classes on private property. A decade after *Zorach,* the court held in *School District of Abington v. Schempp*[46] that such instruction would be permissible during release time away from school and under the supervision of a religious organization. The Tenth Circuit in *Lanner v. Wimmer,*[47] relied upon *Zorach* in finding that the mere release of students during school hours to attend religious courses did not unconstitutionally advance or inhibit religion even though, as a practicable matter, such accommodation may be beneficial to religious interests.

Although the religious release time issue now appears to be well settled under both state and federal law, in recent years, local school boards have experienced a resurgence of objections to religious release time programs. In one California school district, the resurgence of this community dissatisfaction led the governing board to rescind its policy allowing religious release time.

In a second southern California district, the governing board impaneled a study committee, composed of proponents and opponents of religious release time, together with representatives of the school faculty and administration, interested community members, and religious leaders. Of primary concern was whether the time spent away from the public school program lessened the effectiveness of an integrated public school curriculum. The committee found no such detriment. However, after months of study of the present program, the conducting of a community survey, and the taking of testimony from proponents and opponents, the committee found that it was also being asked to address issues such as whether religious release time groups could collect newspapers for recycling on school grounds prior to the school day, or whether such activity constituted an impermissible entanglement with religion. Certain members of the committee claimed that the once-a-month newspaper collection by religious release time supporters for fundraising violated the prohibition upon excessive entanglement of church and state because it was mentioned in the school newsletter, and occurred in the school parking lot.

Other members of the committee objected to the fact that, at certain school sites, the religious release time portable classroom trailer was located on the school parking lot. Upon determination that a local religious release time group's placement of a trailer for instructional purposes on the school parking lot was in violation of both the state and federal constitutions, the committee found itself embroiled in issues of local traffic patterns and liability for student safety for students going to and coming from the religious release time trailer upon placement off school property.

Final recommendations of the committee included the removal of religious release time trailers from school property in the case of two schools, the closure of the program at one school because of the lack of availability of safe off-campus sites for such a program, and the discontinuance of religious release time fundraising paper drives on school property. Programs at remaining school sites continued without modification.

Despite the narrow and relatively innocuous findings of the committee, it was clear from the weeks and months of meetings wherein proponents and opponents articulated their fears, biases, and hopes for public education that all participants in the process had experienced a need to explain the parameters of their beliefs and the depth of their feelings to other members of the local community. This renewed emphasis on the expression of one's personal beliefs with respect to religious and other constitutional freedoms suggests that school board members and administrators should anticipate continued challenges to curriculum and instructional practices, notwithstanding the recent guidance that federal and state courts have provided in these areas.

The Establishment and Free Exercise Clauses Revisited: Grove v. Mead School District

During the same year that the federal district court rendered its initial decision in *Mozert*,[48] the Ninth Circuit decided a challenge by parents in the state of Washington to high school curriculum that asserted both free exercise and establishment clause issues. The court in *Grove v. Mead School District*,[49] held that to establish a free exercise violation, a litigant must show that challenged state action has a coercive effect that operates against the litigant's practice of religion. The court must examine the extent of the burden upon the exercise of religion, the existence of a compelling state interest justifying the burden, and the extent to which accommodation of the complainant would impede the state's objectives. This is the test that school board members and administrators must be prepared to apply upon assertion of a challenge to an instructional practice or curriculum. In *Grove*, the court held that, "[i]n light of the absence of coercion and the critical threat to public education, we conclude that the school board has not violated the free exercise clause."[50]

The Ninth Circuit upheld the trial court's dismissal of the lawsuit, which was based upon the school board's refusal to remove a book from the sophomore English literature curriculum. Cassie Grove read part of the assigned book, *The Learning Tree*, and found it offensive to her religious beliefs. Upon being informed of these objections by Cassie's mother, the school assigned the student another book and gave her permission to leave the classroom during discussions of *The Learning Tree*. Cassie nevertheless chose to remain in class. Her mother was granted a hearing before the school board, wherein the board denied their request to remove the book from the school curriculum. Mrs. Grove, and Warren and Sylvia Riddle, next initiated a civil rights action under section

1983, contending that the use of *The Learning Tree* violated both religion clauses. The Riddles alleged that they had standing to sue as taxpayers, stating that they had school age children in the district. They did not, however, allege that their children had attended school in the district. The Ninth Circuit held that the Riddles had no standing to pursue their free exercise claims, since they could present no claim of violation of a personal right of religious freedom. As taxpayers, they could bring an establishment clause challenge only if they could show direct and particular economic detriment resulting from the disputed practice.[51]

Examining the free exercise claim, the court held that to establish a violation, the litigant must demonstrate that the challenged state action has had a coercive effect operating against the litigant's practice of religion. The Ninth Circuit has ruled that three factors must be examined: "(1) the extent of the burden upon the exercise of religion, (2) the existence of a compelling state interest justifying the burden, and (3) the extent to which accommodation of the complainant would impede the state's objective."[52] The Ninth Circuit found that the burden upon Cassie's exercise of religion was minimal since she had permission to avoid classroom discussions, and no coercion existed. The state's interest, on the other hand, in providing a well-rounded public education, would have been critically impeded if Grove's request had been granted. The court observed that if it were to eliminate everything objectionable to any religious body existing in the United States, or inconsistent with any of their doctrines, public education would be left in shreds.[53]

In examining the establishment clause challenge, the court applied the three-part *Lemon* test, observing that the option of non-participation does not save state action from an establishment clause challenge. Appellants in *Grove* contended that the use of the text in an English literature class had the primary effect of inhibiting their religion, fundamentalist Christianity, because it advanced the "religion of secular humanism." The court determined that "*The Learning Tree* . . . was included in a group of religiously neutral books in the review of English literature as a comment upon American subculture, . . . and did not constitute an establishment of religion or anti-religion."[54]

Free Exercise and the Opt-Out Approach: The Abortion Controversy Unit

Typically, states have established some statutory provisions governing the time, place, and content of instruction pertaining to family life education. A California statute provides that no governing board may *require* a pupil to attend a class in which human reproductive organs or their functions or processes are described, illustrated, or discussed.[55] When such classes are offered, the parent must first be notified in writing, and an opportunity provided for the parent to request in writing that the child not attend. The parent must be notified in advance of the opportunity to inspect and review the materials. The statute further provides that the credential of a teacher who knowingly and willfully fails to make such material available or to make such notification may be revoked.

In most jurisdictions, the right of a parent to withdraw a student from family life education has been litigated, and is well established. However, a recent variation upon that scenario emerged from a Southern California school district while the decision of the U.S. Supreme Court in *Webster*[56] was under submission. During the 1988-89 school year, the local K-8 school district had established a committee composed of parents, community members, and instructors to review the curriculum for its family life education unit. Several committee members objected to the portion of the unit on the subject of abortion. This was, in turn, met with the objections of community members and instructors who strongly felt that students at the eighth grade level may already be called upon to make decisions concerning whether they should become sexually active. An important consideration, argued the proponents, was the subject of the responsible use of abstinence or birth control, and the consequences and remedies for the failure to do either.

Committee meetings were well attended by interested community members, and widely reported in local newspapers. Following a determination by the governing board concerning the parameters of the family life education curriculum, a member of the committee, an eighth grade social science teacher, tested the limits of the above-described statute and the tolerance of community members and parents asserting religious objections to the presentation of the topic of abortion within the family life curriculum.

In his eighth grade social studies class wherein the curriculum framework provided for the discussion and analysis of controversial issues within American historical events, the instructor presented a two day abortion controversy unit. The unit was not a part of the health, science, or family life curricula. The instructor reviewed the curricular objectives in advance with the school administration and with his teachers' association. The purpose of the unit was to study constitutional interpretation and the historical roots of modern controversies, utilizing critical thinking skills to analyze important social movements in American history. The focus of the lesson was the constitutional issue of the right to freedom of choice. The instructor deliberately omitted any explanation of or reference to the biological process of conception or the surgical procedure of abortion. The issue presented for student analysis was instead whether or not women have a constitutional right to choose to terminate a pregnancy. A sub-theme of the unit was how political appointments to the U.S. Supreme Court may change the tenor of the decisions of the Court.

The assignment provided that students would meet in assigned work groups and compile a group list of pro and con arguments for both pro-choice and pro-life positions, basing the arguments on historical concepts and documents studied in the class, such as the fourth amendment to the U.S. Constitution, and the constitutional right to privacy. Personal opinions of pupils were neither solicited nor encouraged. Rather, the product of the group project was a composite listing of pro-choice and pro-life arguments. Once this portion of the assignment was completed, the students were to analyze the historical facts contributing to the development of positions on both sides of the issue in light of what historical developments in American history might have led to the pro-choice/pro-life issue being of current importance. Students could receive extra credit for watching the May, 1988 television broadcast on the constitutional issues of abortion while the Supreme Court's *Webster* decision was still under submission.

Parents and a community member filed a complaint concerning the instructor and the presentation of the curriculum. Following a closed session school board hearing on the complaint, the board found that the student, upon the assertion of religious objections, had been signed out of the class by the parent. There had been no request for alternative instruction, although the parent's complaint stated that the instruction was inappropriate for all eighth graders, and asserted that the teacher should have been required to notify the parents.

The governing board's findings determined that the state law concerning notification had not been violated, that the student asserting religious objections had been properly excused, and that there was no compulsion to remain in violation of the free exercise clause.

Pico Revisited: Challenges to School and Classroom Libraries

In October, 1988, a second grade teacher in a California school district read aloud to students from the school library book, *"The Witches,"* by Roald Dahl. Parents complained that the book begins with the statement, "This is not a fairy tale. This is about real witches." Parents objected that the book disguised real witches who dress in ordinary clothes, look like ordinary women, hate children, and who "do away with one child a week." The reading of the book was objected to as the establishment of a satanic religion, and its removal from the school library was requested. After an analysis of the complaint, the school review committee affirmed that the book, *The Witches,* met the criteria of the district administrative regulation for instructional materials, that professional journals for public school libraries characterize the book, *The Witches,* as appropriate reading material for grades three through seven, and that the book, "may be an appropriate selection for the more mature readers of an elementary school library program." The committee recommended that the district consider developing a policy concerning selection and selection criteria for books to be read aloud by teachers in the classroom.

The familiar standard for school libraries was articulated by the U. S. Supreme Court in *Board of Education v. Pico*[57] wherein the Court held that local school boards may not remove books from school library shelves simply because the board dislikes the ideas contained in those books, seeking by the removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.

In *Pico,* the removal was initiated when parents compiled a list of books which they deemed objectionable and, "improper fare for students." After the books were quietly removed from school libraries upon an unofficial directive from the board, publicity followed, and the board justified its removal of the books on the grounds that they were, "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[58] Despite the appointment of a review committee and recommendations by the committee with respect to each individual book, the board restored only one book to the library.

In *Pico,* the Court emphasized that the books were library books, the reading of which was optional. It recognized the discretion of local boards in the management of school affairs and the right of such boards to establish and apply their curriculum in such a way as to transmit community values. However, the Court held that this discretion is limited by the duty of local boards to discharge their functions within the limits and constraints of the first amendment, which embraces the right to receive information and ideas as well as the right to communicate or send such ideas. The clarity of this holding notwithstanding, local school boards have not been inhibited from banning books from school libraries.

In *Wexner v. Anderson Union High School District,*[59] a California appellate court recently determined that the local school board could not remove books from school libraries. The court reversed the trial court's ruling that allowed the board to prohibit classroom use of particular books and require parental consent for minor students to have access to selected reading material.

In *Wexner,* California's Third District Court of Appeals narrowed the issue so as to avoid federal constitutional questions by focusing on the state statutory scheme for school libraries. The court observed that there was no provision in the statutory scheme that authorized districts to winnow library books based upon their perceived offensive content or social unacceptability. It held that while a school board had the authority to remove books which meet the legal definition of obscenity, since obscenity by definition is outside the scope of free speech constraints, the books in question did not qualify as obscene.[60] On the contrary, they enjoyed widespread critical acclaim.

The case was initiated when a high school reading teacher directed students to select books from the school library, his classroom, or their homes to read and report on for credit. The teacher had placed in his classroom in the school library copies of several books written by Richard Brautigan, including, *The Abortion: A Historical Romance 1966,* and *The Pill v. The Upringhill Mine Disaster.* When the principal determined that such books were inappropriate for students because they suggested controversial sex education materials, he directed that they be delivered for review.

The school board concluded that five of the books were not, "socially acceptable to the people within the Anderson Union High School District because of obscenities and sexual references."[61] When the board ordered the books removed from the library and barred their use in reading classes, the teacher, students, and a publisher of the books challenged the action in superior court. Although the trial court granted summary judgment for plaintiffs on the grounds that the books were not legally obscene for minors, and posed no threat to the educational process, it did suggest that the books could be placed in a restricted area where minor students could not obtain them without prior parental consent. The court also said the board could forbid classroom discussion of the books if used in reading classes. The decision of the Third District Court of Appeals affirmed the summary judgment, but struck the dicta of the trial court concerning prior parental consent and the prohibition against classroom discussion as being beyond the scope of the issues presented by the pleadings.[62]

California state law was the basis for upholding the right of the students to select the Brautigan books for class reports. State law provides that:

> Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be pro-

> hibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.[63]

The position of the California Court of Appeal in *Wexner* is to be contrasted with that of the opinion of the U.S. Court of Appeals for the Eleventh Circuit. In *Virgil v. School Board of Columbia County*,[64] the parents of a student who had taken a humanities class for high school juniors and seniors objected to the text for the course on the grounds that among the optional readings in the text were *Lysistrata*, written by the Greek dramatist Aristophanes in approximately 411 B.C. and *The Miller's Tale*, written by English poet Geoffrey Chaucer in approximately 388 A.D. Although neither piece was required reading, both were included in the text, and during the fall semester, a portion of the *Lysistrata* was read aloud during a class session of the humanities course.

After review of the parental complaint by the committee, the school board voted to discontinue future use of the volume containing the two objectionable works in the curriculum. Despite the decision by the local board to remove the text from the classroom, the identical volume continued to be available in the school library, along with other versions and translations of both works. Relying upon the opinion of the U.S. Supreme Court in *Hazelwood School District v. Kuhlmeier*,[65] the federal court concluded that the board decisions at issue were curricular decisions, wherein the mere inclusion of the material in the text, in the court's opinion, constituted the imprimatur of school approval. The Eleventh Circuit Court of Appeals concluded:

> Notwithstanding their status as literary classics, *Lysistrata* and *The Miller's Tale* contain passages of exceptional sexual explicitness, as numerous commentators have noted . . . . Under all the circumstances of this case, we cannot conclude that the board's action was not reasonably related to the stated legitimate concern. We decide today only that the board's removal of these works from the curriculum did not violate the Constitution. Of course, we do not endorse the board's decision. Like the district court, we seriously question how young persons just below the age of majority can be harmed by these masterpieces of western literature. However, having concluded that there is no constitutional violation, our role is not to second guess the wisdom of the board's action.[66]

The inquisitive school lawyer may speculate that had Florida had a state statute mandating the right to student freedom of expression such as the state law relied on by the California appellate court in *Wexner*, the actions of the local Florida school board in editing optional classroom reading materials might have been reversed.

Prayer at Graduation as an Unlawful Establishment of Religion

A California high school senior and taxpayer recently challenged the decision of the local school board to allow a religious invocation at the high school graduation ceremony. In *Bennett v. Livermore Unified School District*,[67] the student brought an action in the superior court to enjoin the district's practice of allowing an invocation at graduation ceremonies. The invocation had traditionally been delivered by a student or member of the clergy. Although the district had no specific content guidelines and did not require the giving of an invocation, a graduation invocation had been a school tradition for some 12 years. The invocation was challenged on establishment clause grounds, and on the basis that the practice further violated the state constitution, which provides that:

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly in any of the common schools of this State.[68]

The state appellate court, applying the *Lemon* test, and the holding of the U. S. Supreme Court in *Wallace v. Jaffree*[69] held:

> We therefore align ourselves with those cases holding *impermissible* the inclusion of an invocation at a public school graduation ceremony, finding that it violates both the United States and the California Constitutions."[70]

CONCLUSION

The lesson for school board members, administrators, and school lawyers from the representative sample of cases discussed herein is that curriculum and instructional practice challenges brought under both the establishment and free exercise clauses continue to attempt to expand the legally recognized grounds for limiting curriculum, limiting instructional practices, allowing curriculum options, or sanctioning home schooling. Administrators and school board members should be prepared to examine curriculum, instructional materials, school ceremonies, and instructional practices in terms of whether such may be found to constitute an unlawful deprivation of free exercise or an unlawful establishment of religion.

Educators must become accustomed to the necessity of planning and presenting instruction so as to withstand such challenges. The potential harm of the popular opt-out remedy, the loss of the facility for continuity of curriculum, the certain loss of accountability for student progress when students are permitted to opt out of portions of the core educational program, and the diminished heterogeneous peer environment, all constitute real life lessons to the students to be wary of critical thinking—the very concept that public schools utilize to teach students to become useful citizens. Public schools must not, by example, teach students the lesson that one may always opt out of life's important choices and situations when the available alternatives do not reflect the world view of the student. Rather, as the Supreme Court recently reiterated in *Bethel School District No. 403 v. Fraser,*[71]

> The role and purpose of the American public school system was well described by two historians who stated: public education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.
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> These fundamental values of habits and manners of civility essential to democratic society must, of course, include tolerance of divergent, political, and religious views, even when the views expressed may be unpopular. [The] . . . "fundamental values" must also take into due account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students . . . .[72]

As the Ninth Circuit cautioned in *Grove,* if the schools were to eliminate everything objectionable to any religious body in this country, or any material inconsistent with their doctrines, public education would be left in shreds. It is the responsibility of educators to assist the courts in a critical analysis of free exercise and establishment clause claims opposing instructional materials and practices in order that such challenges do not defeat the very purpose of a public education.

END NOTES

1. 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd,* 827 F.2d 1058 (6th Cir. 1987).
2. 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd,* 827 F.2d 684 (llth Cir. 1987).
3. *Mozert,* 647 F. Supp. at 1195.
4. *Id.* at 1203.
5. *Mozert v. Hawkins County Public Schools,* No. CIV-2-83-401 (E.D. Tenn. Dec. 1986) (Memorandum and Order).
6. Attorneys for the plaintiffs in the Tennessee textbook case stated that their political agenda included the acquiring of a voucher system for non-public schools.

7. It was at this point that the New York State School Boards Association, among many other associations, submitted an *amicus curiae* brief. In this brief, it was pointed out that New York school districts educate more than three million children. One of these districts educates approximately one million children. This number is greater than the school districts of Chicago and Los Angeles combined. Children enrolled in the public school districts of New York speak 95 languages and come from a most diverse religious population.

8. 647 F. Supp. at 1203.

9. *Id.*

10. *Mozert*, 827 F.2d. 1058, 1063-64 (6th Cir. 1987).

11. 108 S. Ct. 1029 (1988).

12. *Smith v. Board of SchoolComm'rs*, 655 F. Supp. 939 (S.D. Ala. 1987).

13. It seems obvious what the next step would be in this scenario. If in fact religion is already being taught in the schools, i.e., "secular humanism", then prayer in schools should also be allowed. Judge Hand, in the earlier Alabama prayer case entitled, *Jaffree v. Board of School Commissioners,* 554 F. Supp. 1104 (S.D. Ala. 1983), had opined that Alabama's school prayer statutes were constitutional and that states could establish their own religion.

14. The New York State School Boards Association became involved in the case as an *amicus curiae* at this time. 827 F.2d 684 (11th Cir. 1987).

15. *Id.* at 693, n. 10.

16. *Id.* at 693.

17. 72 N.Y.2d 174, 527 N.E.2d 767, 531 N.Y.S.2d 889 (1988).

18. 512 N.Y.S.2d 305, 134 Misc. 658 (N.Y. Sup. Ct. 1987).

19. 1989 N.Y. Sess. Law Serv. 748 (McKinney, July 24, 1989).

20. 689 F. Supp. 106 (N.D.N.Y. 1988).

21. U.S. CONST. amend. I.

22. N.Y. Educ. Law § 3204(2) (McKinney 1981 & Supp. 1988).

23. 689 F. Supp. at 112.

24. U.S. CONST. amend. I.

25. 406 U.S. 205 (1972).

26. 689 F. Supp. at 129 (citing *Bowen v. Roy*, 476 U.S. 693, 707 n.17 (1986)).

27. *Id.* at 128-29 (citing *Bob Jones University v. United States*, 461 U.S. 574 (1983); *United States v. Lee,* 455 U.S. 252 (1982)).

28. 689 F. Supp. at 128-29 (citing *United States v. Lee*, 455 U.S. at 259).

29. *Guidelines on Home Instruction,* New York State Dept. of Educ. (September 1985).

30. *In re Franz*, 378 N.Y.S.2d 317, 84 Misc. 2d 914 (N.Y. City Fam. Ct., 1976), *aff'd,* 390 N.Y.S.2d 940, 55 A.D.2d 424 (N.Y. App. Div. 1977). *See also* New York Education Law § 3204(2).

31. *In re Franz*, 378 N.Y.S.2d at 324, 84 Misc. 2d at 920-21.

32. 468 A.2d 977 (Me. 1983).

33. *Id.* at 980.

34. 347 U.S. 483 (1954).

35. 689 F. Supp. at 131.

36. *Blackwelder v. Safnauer*, 866 F.2d 548 (2d Cir. 1989).

37. 403 U.S. 602 (1971).

38. 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (Cal. Ct. App. 1975), *rehg. denied,* 425 U.S. 1000 (1976).

39. *Id.* at 19, 124 Cal. Rptr. at 82.

40. *Id.* at 32, 124 Cal. Rptr. at 91.

41. 619 F.2d 1311 (8th Cir. 1980).

42. *Id.* at 1317.

43. Cal. Educ. Code § 46014 (West 1978 & Supp. 1989).

44. 78 Cal. App. 2d 464, 178 P.2d 488 (Cal. Ct. App. 1947).

45. 343 U.S. 306 (1952).

46. 374 U.S. 203 (1963).

47. 662 F.2d 1349, 1347 (10th Cir. 1981).

48. *Mozert v. Hawkins*, 647 F. Supp. 1194 (E.D. Tenn. 1986).

49. 753 F.2d 1528 (9th Cir. 1985).

50. *Id.* at 1534.

51. *Id.* at 1532.

52. *Id.* at 1533 (citing *Callahan v. Woods*, 736 F.2d 1269, 1273 (9th Cir. 1984)).

53. *Id.* at 1533 (citation omitted).

54. *Id.* at 1534.

55. Cal. Educ. Code § 51550 (West 1989).

56. *Webster v. Reproductive Services*, 109 S. Ct. 3040 (1989).

57. 457 U.S. 853 (1982).

58. *Id.*

59. 209 Cal. App. 3d 1438, 258 Cal. Rptr. 26 (Cal. Ct. App. 1989).

60. 258 Cal. Rptr. at 31.

61. 258 Cal. Rptr. at 30.

62. 258 Cal. Rptr. at 38.

63. Cal Educ. Code § 48907 (West Supp. 1989).

64. 862 F.2d 1517 (11th Cir. 1989).

65. 484 U.S. 260 (1988).

66. *Virgil v. Columbia*, 862 F.2d at 1523-25.

67. 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (Cal. Ct. App. 1987).

68. Cal. Const., article IX, § 8.

69. 472 U.S. 38 (1985).

70. *Bennett v. Livermore*, 193 Cal. App. 3d at 1016, 238 Cal. Rptr. at 821.

71. 478 U.S. 675 (1986).

72. *Id.* at 681.

Unemployment Benefits and Free Exercise Rights

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INTRODUCTION

After nearly two decades of relatively minimal activity in the area, the Supreme Court, during the 1980's, decided several key cases concerning the effect of unemployment compensation laws and employer policies on the rights of an employee to exercise freely his religious beliefs. These decisions, which are the subject of this chapter, reflect a trend toward expanding the range of religious convictions that fall within the scope of the first amendment's free exercise clause. Courts today are increasingly willing to find that an employee's refusal to work for religious reasons constitutes good cause, a holding which enables more employees to receive unemployment benefits. Being conscious of this trend can be in the best financial interest of an employer when developing employee personnel policies.

While many of the Supreme Court decisions reviewed involve employers other than school boards, the decisions nonetheless provide sufficient guidance for all employee-employer relations. This discussion begins with an examination of the landmark case, *Sherbert v. Verner,*[1] in which the Supreme Court upheld an employee's right to observe his religious beliefs under the first amendment's free exercise clause despite a resulting conflict with his employer's work policies. Supreme Court decisions decided subsequent to *Sherbert: Thomas v. Review Bd. of the Ind. Employment Sec. Div.,*[2] which expanded the religious grounds on which an employee may refuse work; *Estate of Thornton v. Caldor, Inc.,*[3] which imposes limitations on the Sherbert decision based on the establishment clause; and *Ansonia Bd. of Educ. v. Philbrook,*[4] which considered the effect of Title VII on an employer's responsibility to accommodate his employee's religious freedoms are also reviewed. Finally, Supreme Court decisions establishing what religious beliefs are entitled to constitutional protection are discussed.

Sherbert v. Verner: Working on the Sabbath

In 1963, the Supreme Court decided *Sherbert v. Verner,*[5] in which the Court for the first time upheld an employee's right to unemployment compensation after the employee refused employment because of religious beliefs. Sherbert was a member of the Seventh-Day Adventist Church and worked in a South Carolina textile mill. When her employer changed to a six-day work week, Sherbert refused to work on Saturday, the Sabbath Day of her faith, and was fired. Sherbert sought work at three other mills in the area, but found no satisfactory five-day work available. She then filed a claim for unemployment benefits. The State Employment Security Commission denied the claim, stating that Sherbert had "failed, without good cause, to accept available suitable work when offered . . . ," as was required by the South Carolina Unemployment Compensation Act.[6] Sherbert subsequently filed suit, claiming that the requirements of the South Carolina statute infringed upon her right to the free exercise of her religion as guaranteed by the free exercise clause of the first amendment. Both the Court of Common Pleas and the South Carolina Supreme Court affirmed the commission's decision.

The United States Supreme Court reversed and awarded Sherbert unemployment benefits, holding that the disqualifying provisions of the South Carolina statute were unconstitutional as applied to Sherbert. A religious belief involving rest on the Sabbath, the Court decided, constituted good cause to refuse offered work. The Court reasoned first that the denial of benefits imposed a burden on the free exercise of Sherbert's religion. The ruling forced her to choose between "following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[7] The Court further held that the state had not shown a compelling interest justifying the burden imposed on Sherbert's first amendment freedoms. Neither the possibility of fraudulent unemployment claims nor the hardship employers might incur in making work schedules to accommodate employees with similar religious beliefs were seen as sufficient grounds for infringing on Sherbert's religious beliefs. The Court carefully noted, however, that its decision did not go so far as to establish a constitutional right to unemployment benefits for all persons not working because of religious convictions.[8]

SUBSEQUENT RULINGS ON AN EMPLOYEE'S RELIGIOUS RIGHTS

Thomas v. Review Bd. of the Ind. Employment Sec. Div.: Work Objectionable Due to Religious Beliefs

In *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*,[9] the Supreme Court extended the Sherbert holding and awarded unemployment benefits to an employee who voluntarily left his job because of his religious convictions. *Thomas* involved the case of a Jehovah's Witness who was initially employed in a roll foundry fabricating sheet steel. After closing the foundry, the employer transferred Thomas to a department that manufactured military tanks. When Thomas learned that all the remaining departments produced armaments he asked to be laid off, stating that his participation in the production of armaments would violate his religious beliefs. When his request was denied, Thomas quit his job and later applied for unemployment benefits. The Review Board of the Indiana Employment Security Division denied his request for benefits based on provisions of the Indiana Employment Security Act, and found that Thomas "left his employment without good cause."[10] The Indiana Court of Appeals reversed the review board's decision, holding that Thomas' right to the free exercise of his religion was improperly burdened. The Indiana Supreme Court overruled the court of appeals and denied unemployment benefits to Thomas, stating that relief should not be granted to persons leaving work voluntarily for personal reasons.[11]

The United States Supreme Court reversed and granted unemployment benefits to Thomas, holding that when Thomas left his job for religious reasons, he did so with good cause. The Court found the "coercive impact"[12] on Thomas' religious rights indistinguishable from the facts in *Sherbert;* what a particular job entails may be just as offensive as when that job is performed. "In both cases, . . . the employment, once acceptable, became religiously objectionable because of changed conditions"[13] brought about by the employer. As in *Sherbert,* the Court acknowledged that this type of burden on a person's religious freedom may be justified by some compelling state interest, but found no sufficient interest to exist in the facts before it.

Estate of Thornton v. Caldor, Inc.: The Establishment Clause

More than two decades after its decision in *Sherbert,* the Supreme Court again considered the issue of an employee's first amendment right to refuse work on his Sabbath. In *Estate of Thornton v. Caldor,*[14] the Court considered a Connecticut statute that prohibited an employer from requiring an employee to work any one day of the week which the employee observes as his Sabbath.[15] The Court struck down the statute as going too far; providing Sabbath observers with "an absolute and unqualified right"[16] to refuse work on their Sabbath violated the establishment clause of the first amendment because the statute was mandatory and provided no exceptions for special circumstances.[17] Both employers and other employees were forced to adjust work schedules to accommodate an individual's observance of his Sabbath. The statute, the Court stated, "advance[d] a particular religious practice,"[18] and therefore violated the first amendment prohibition against government establishment of religion.

The *Thornton* decision marks the outer boundary of the Court's earlier ruling in *Sherbert*. To comply with the free exercise clause of the first amendment, a state unemployment compensation law may not impose a substantial burden on an individual's religious beliefs unless the law can be justified by a compelling state interest. Yet to comply with the establishment clause, a state may not go so far as to provide an individual with an absolute and unqualified right to conduct himself in accordance with his religious beliefs. The Court thus far has not recognized any state interest sufficient to curb an individual's religious rights in the field of unemployment compensation. The Court's decisions seem to indicate a trend toward expanding these rights, subject to the limit established by the *Thornton* decision and the establishment clause.

Ansonia Bd. of Educ. v. Philbrook: Title VII Requirements

The Supreme Court decisions discussed up to this point have dealt primarily with an individual's right to exercise his religious beliefs and to collect unemployment compensation when doing so results in losing his job.

In *Ansonia Board of Education v. Philbrook,*[19] the Supreme Court considered the effect of Title VII of the Civil Rights Act of 1964 on an employer's responsibility to accommodate an employee's religious beliefs. Title VII requires an employer to "reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of an employer's business."[20] Philbrook, a high school teacher, was a member of the Worldwide Church of God. The church required its members to refrain from working on certain religious holidays, six of which fell on school days. Under the school board's collective-bargaining agreement with the Ansonia Federation of Teachers, Philbrook was allowed three days' annual leave for the observation of religious holidays. The contract also provided three additional days' annual leave for personal business with the qualification that an employee could not use these days for religious observances. Initially, Philbrook used his three allowed religious absences and observed the remaining three religious holidays by taking unauthorized leave and receiving a corresponding reduction in his pay. Later, Philbrook requested that the school board allow him to use the personal business days for religious observances. As an alternative, he offered to pay the cost of a substitute while receiving his full pay for the additional days off. The school board rejected both of these suggestions.

Philbrook subsequently filed suit, alleging Title VII violations and requesting both back pay and injunctive relief. The district court found that he failed to prove religious discrimination because he had not been faced with the choice of either violating his religious beliefs or losing his job. The court of appeals reversed and remanded for further proceedings because it decided that Philbrook had proven religious discrimination in that exercising his sincere religious convictions conflicted with his employer's attendance policies. The court of appeals further stated that while the school board's leave policy was a reasonable accommodation to Philbrook's religious beliefs, that was not enough. Rather, Title VII requires an employer to adopt the employee's accommodation proposal unless that proposal would constitute an undue hardship on the employer's business.

The Supreme Court affirmed the court of appeals' decision to remand the case for further factual determinations, but disagreed with the court of appeals' interpretation of Title VII. The Supreme Court read the statute as providing that "any reasonable accommodation by the employer [of an employee's religious beliefs] is sufficient to meeting its accommodation obligation."[21] Only when an employer's policies do not reasonably accommodate the employee's religious beliefs is the employer required to adopt an accommodation preferred by the employee, and that requirement is subject to an evaluation as to the extent of undue hardship imposed on the employer's business. Turning to the policy of the school board, the Court found that the unpaid leave requirement for religious observances which exceeded the holidays provided in the collective-bargaining agreement was "generally" reasonable.[22] However, the Court qualified this by stating that "unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes except religious ones."[23] The Court, finding the record insufficient to determine whether such religious discrimination existed in Philbrook's situation, remanded the case to district court for further proceedings.

WHAT RELIGIOUS BELIEFS ARE ENTITLED TO CONSTITUTIONAL PROTECTION?

The Supreme Court has made it clear in its rulings that an employer must make reasonable accommodations to allow its employees to observe their religious beliefs. In addition, an employee who leaves his job voluntarily or is terminated because of a conflict between his personal religious convictions and the work requirements of his employer will generally be considered unemployed for good cause and eligible for unemployment benefits. To fully understand the decisions addressing these issues, a remaining question must be answered: What constitutes a "religious belief" entitling an employee to favorable treatment by his employer? The Supreme Court has provided guidelines for answering this question in its recent decisions.

Thomas v. Review Bd. of the Ind. Employment Sec. Div.

In the *Thomas*[24] decision discussed earlier in this article, the Supreme Court stated that a court's role in considering the legitimacy of an individual's religious beliefs is a limited one. "The determination of what is a religious belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [f]irst [a]mendment protection."[25] The employee in *Thomas* was a Jehovah's Witness who refused to participate in the production of armaments. Another Jehovah's Witness employed at the plant saw no conflict between that work and the teachings of his faith. The Court found these "interfaith differences"[26] of opinion to be of no significance. "The guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect."[27] Instead, a court should limit its inquiry to the question of whether an employee "terminate[s] his work because of an honest conviction that such work [is] forbidden by his religion."[28] The Court held that Thomas met this requirement.

Hobbie v. Unemployment Appeals Commission of Florida

Hobbie v. Unemployment Appeals Commission of Florida.[29] involved a jewelry store manager who joined the Seventh-Day Adventist Church two and one-half years after being hired. During that time Hobbie regularly worked evenings and Saturdays. Immediately after her baptism, Hobbie informed her employer that, because of her religious beliefs, she would no longer be able to work on her Sabbath, which lasted from sundown on Friday until sundown on Saturday. The general manager informed Hobbie that she would have to work her scheduled shifts or resign from the company. When Hobbie refused both options, the store discharged her. Hobbie later filed a claim for unemployment benefits, which the Florida Department of Labor and Employment Security denied, stating that Hobbie had been discharged for "misconduct connected with her work."[30]

After both the appeals commission and a state court of appeals affirmed the decision of the Florida Department of Labor and Employment Security,[31] the United States Supreme Court reversed and awarded Hobbie unemployment benefits. The Court, in reviewing its past decisions, saw no "meaningful distinction"[32] among the situations in *Sherbert, Thomas* and *Hobbie.* Hobbie changed her religious beliefs after she had been employed and, as such, the employer was not responsible for the change which produced the conflict between Hobbie's religious beliefs and her work requirements. However, the Court found the "timing of Hobbie's conversion [to be] immaterial,"[33] and refused "to single out the religious convert for different, less favorable treatment.34 The relevant question to consider under the free exercise clause, the Court reasoned, is the burden imposed on an employee's religious beliefs. The Court found that the burden in Hobbie's case exceeded first amendment limitations.

Frazee v. Illinois Dept. of Employment Sec.

The Court's most recent decision regarding an employee's religious rights, *Frazee v. Illinois Dept. of Employment Sec.*,[35] was decided in March 1989. *Frazee* involved an employee of Kelly Services who refused to accept a temporary retail assignment that would have required him to work on Sunday. Frazee stated that he was a Christian and could not work on "the Lord's Day." When he later applied for unemployment benefits, the Illinois Department of Employment Security rejected his claim, finding that Frazee had "failed, without good cause, . . . to accept suitable work."[36] The board of review reasoned that Frazee's refusal to work was not based on the teachings of any specific church, sect or denomination, but rather on his own personal, noncompelling beliefs, which did not constitute good cause. Both the circuit court and Illinois Appellate Court affirmed the board of review's decision. The Illinois Supreme Court denied Frazee leave to appeal.

The United States Supreme Court reversed and awarded Frazee unemployment benefits. The Court held that Frazee's nondenominational Christian beliefs constituted good cause for his refusal to work on Sunday. The Court "reject[ed] the notion that to claim the protection of the free exercise clause, one must be responding to the commands of a particular religious organization."[37] Frazee's "sincerely held religious belief"[38] was sufficient to entitle him to the protections of the first amendment.

Austin v. Berryman

Prior to the Supreme Court's decision in *Frazee*, the Fourth Circuit Court of Appeals decided *Austin v. Berryman*.[39] While the case did not involve an employer policy that conflicted with an employee's religious beliefs, the case serves as an indication of how far courts will go in affording first amendment protection to various types of religious beliefs.

When her husband decided to move 150 miles away to care for his mother, Austin quit her job to accompany him. Austin and her husband had been longtime members of the Holiness Church, which teaches that the Bible requires a wife to honor her husband and requires a family to care for its parents.[40] When Austin failed to find employment after moving, she applied for unemployment benefits and was rejected because she left work voluntarily without good cause. The applicable state law specifically stated that leaving work to accompany a spouse to a new locality was not good cause for substantiating an award of unemployment compensation.[41]

Austin subsequently filed suit in United States District Court, which reversed the state employment commission's decision and awarded Austin unemployment benefits. The Fourth Circuit Court of Appeals affirmed,[42] citing as precedent the Supreme Court decisions of *Sherbert, Thomas* and *Hobbie*. The Fourth Circuit found that Austin had "unquestionably established" that she left her employment because of "sincere religious beliefs."[43] The dissenting judge found no religious discrimination against Austin and distinguished *Sherbert, Thomas* and *Hobbie* as cases in which the employer could have accommodated the religious beliefs of the employee; in *Austin*, her employer had no "practical possibility" of accommodating her religious beliefs.[44] There appears to be inconsistencies between the majority's ruling in *Austin* and the Supreme Court's holding in *Philbrook*, even though *Philbrook* was not mentioned in the dissenting opinion in *Austin*.

CONCLUSION

While in some areas the Supreme Court may be adopting a more conservative philosophy on individual rights, the Court seems to continue to expand the religious rights of employees in the workplace. More decisions in this area of constitutional law should be expected. In particular, we may see additional Supreme Court decisions that narrow the gap between the free exercise clause decision of *Sherbert* and the establishment clause decision of *Thornton*. Regardless of any future decisions, however, the Court's position today is clear: employers must be cautious to establish work policies that do not burden the constitutionally protected religious rights of employees.

END NOTES

1. 374 U.S. 398 (1963).
2. 450 U.S. 707 (1981).
3. 472 U.S. 703 (1985).
4. 107 S. Ct. 367 (1986).
5. 374 U.S. 398 (1963).
6. S.C. Code Ann. § 41-35-120(3) (Law Co-op. 1986).
7. 374 U.S. 404.
8. *Id.* at 409-10.

9. 450 U.S. 707 (1981).

10. Ind. Code Ann. § 22-4-15-1 (Burns 1978).

11. 271 Ind. 233, 391 N.E.2d 1127 (1979), rev'd, 450 U.S. 707 (1981).

12. *Thomas*, 450 U.S. at 717.

13. *Id.* at 718.

14. 472 U.S. 703 (1985).

15. Conn. Gen. Stat. Ann. § 53-303e(b) (West 1985).

16. *Estate of Thornton*, 472 U.S. at 710.

17. More specifically, the *Thornton* Court affirmed a Connecticut Supreme Court decision which held the statute unconstitutional. As a result, the Court never considered the underlying facts of the case which involved a retail store manager who refused to work on Sundays.

18. 472 U.S. at 710.

19. 107 S. Ct. 367 (1986).

20. 42 U.S.C. 2000e(j) (1981).

21. *Philbrook*, 107 S. Ct. at 372.

22. *Id.* at 373.

23. *Id.* at 373.

24. 450 U.S. 707 (1981).

25. *Id.* at 714.

26. *Id.* at 715.

27. *Id.* at 715-16.

28. *Id.* at 716.

29. 107 S. Ct. 1046 (1987).

30. Fla. Stat. Ann. § 443.101(b) (West Supp. 1989).

31. The Florida District Court of Appeals issued a *per curia*m order that could not be appealed to the State Supreme Court.

32. *Hobbie*, 107 S. Ct. at 1049.

33. *Id.* at 1051.

34. *Id.* at 1051.

35. 109 S. Ct. 1514 (1989).

36. Ill. Ann. Stat. ch. 48 { 433 (Smith-Hurd Supp. 1989).

37. *Frazee*, 109 S. Ct. at 1517.

38. *Id.* at 1517.

39. 862 F.2d 1050 (4th Cir. 1988).

40. *Id.* at 1052.

41. Va. Code § 60.1-58(a) (Repealed 1987).

42. The court of appeals reversed another part of the district court's decision that Austin's fundamental marriage rights as protected by the fourteenth amendment had been violated.

43. *Austin*, 862 F.2d at 1054.

44. *Id.* at 1061.

Use of Facilities by Outside Religious Groups

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HISTORICAL PRECEDENTS

Early cases reviewing the use of public school facilities for religious purposes by nonstudent religious groups outside of the regular academic day focused on issues related to wear and tear on school property and the diversion of school tax funds for nonschool uses. Courts often centered their opinions on whether school property was being used for regular or permanent meetings.

The leading early case on this issue is *Scofield v. Eighth School Dist.,*[1] in which the Connecticut Supreme Court held that it was unlawful for a school district to permit its schoolhouses to be used for the ordinary purposes of a church. In that case, a citizen complained of the school's facilities being used for public preaching and religious meetings, and also for regular Sunday School. This use continued on every evening of the week, as well as on Sundays. The court's decision striking down the practice was not premised on any identifiable constitutional considerations. Instead, the court ruled that such nonschool use was improper due to fiduciary concepts, stating: "The district is under no more obligation to furnish a public hall for such purposes as may be useful or beneficial to the community than any private individual. And we know of no principle that will justify the misappropriation of trust property for any purpose whatever."[2]

The *Scofield* case was cited as precedent by the Kansas Supreme Court when it ruled that it was a diversion of public funds to permit a public schoolhouse to be used for religious meetings.[3] In *Spencer v. Joint School District,* church groups had altered the school by building platforms and closets for their members' use. Church groups using the school had removed desks from their fastenings and had consumed the school's fuel oil and utilities without compensation. The Kansas Supreme Court did not apply any constitutional or statutory analysis, but looked instead to common law principles, declaring as follows:

> The public school-house cannot be used for any private purposes. The argument is a short one. Taxation is invoked to raise funds to erect the building; but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club. What cannot be done directly, cannot be done indirectly. As you may not levy taxes to build a church, no more may you levy taxes to build a schoolhouse and then lease it for a church.[4]

Later courts grew away from such absolute prohibitions of use of school structures for any religious purpose. The emphasis in the modern cases shifted to an analysis centered on constitutional considerations.

MODERN ANALYSIS

State Statutes

Today the use of public school facilities by nonstudent religious groups is generally addressed by state statutory provisions, which vary from state to state. Most such statutes endow local boards of trustees with the discretionary power to permit outside religious groups to use school property for nonstudent purposes. Such statutes generally are very broad and have not been the primary source of challenges.

Most of the "modern" cases center instead on state or federal constitutional provisions. In one of the earliest cases, the Nebraska Supreme Court had the opportunity to construe the meaning of the following Nebraska constitutional provision:

> No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted.[5]

In *Gilbert v. Dilley*,[6] the court upheld religious groups' use of a schoolhouse for religious meetings on Sunday evenings on an infrequent schedule. The religious groups paid the expenses related to those meetings and never met more than five times in any year—and then only on Sundays. In concluding that the religious groups' infrequent use of the facilities on weekends did not constitute an unlawful misuse of public school property, the Nebraska Supreme Court adopted a more modern analysis, as follows:

> The use of the purposes named is but temporary, occasional, and liable at any time to be denied by the district electors, and such occasional use does not convert the schoolhouse into a building for worship, within the meaning of the [Nebraska] constitution.[7]

Occasional use of school property for religious meetings on Sundays, did not violate the state constitution, particularly where the complaining taxpayer failed to show that he had been subjected to additional taxation because of that use.

Constitutional Provisions

The first case to consider both state and federal constitutional provisions together is the landmark Florida case of *Southside Estates Baptist Church v. Board of Trustees*.[8] Florida has a constitutional provision that no preference should be given by law to any church, and that no public money should be spent "directly or indirectly in aid of any church, sect or religious denomination." Florida also had a statute providing that, "[s]ubject to law, the trustees of any district may provide for or permit the use of school buildings or grounds [during nonschool time] for any legal assembly."

Pursuant to that statute, a district permitted a number of different religious groups to use temporarily various school buildings on Sunday for holding services pending completion of construction of their new churches. The school district was challenged by several of the "established" churches in the community, claiming that such use violated both state and federal constitutional provisions.

The Florida Supreme Court held that such temporary use did not violate provisions of the Florida Constitution. The court found nothing in its record to support a conclusion that any public funds had been contributed to any of the churches, and it considered the slight wear and tear upon the school building to be immaterial. It found that no preference had been given to any one sect or denomination and that all religious groups that had applied had been accorded the same treatment.

The court further held that the temporary use of the school property for holding church services on Sunday was not violative of the establishment clause of the U.S. Constitution's first amendment. The court found nothing in the temporary Sunday use of facilities during construction of permanent church buildings to suggest the involvement of public funds or property in the establishment of a religion or in preferring one religion over another. The Florida Court of Appeals dealt with a similar challenge twenty-five years later, in which they reaffirmed and followed the precedent established in the *Southside Baptist* case. In *O'Hara v. School Board of Sarasota County*,[9] the school district had leased one of its facilities to a Catholic mission for religious services during nonschool hours on weekends.

The court upheld the practice, considering the following key facts: (1) the school district had policies and regulations permitting such use of school property; (2) such use of school property had not interfered with the operations of the school system; (3) the use did not involve direct expenditure of public funds, in that expenses for janitorial services, utilities and other expenses were paid by the church; and (4) the use was not permanent. The church had a plan for the opening of the church building, and a date had been set for the termination of use of the school building. All these factors led the court to conclude that the school board had used reasonable discretion in permitting the use of school property during nonschool time by nonstudent religious organizations.[10]

Subsequent courts have applied a similar analysis in most of the cases. For example, in a New Jersey case, several church groups rented facilities from a school district under a district policy. The district was sued by the plaintiff alleging that the use of school facilities by religious groups violated New Jersey statutes governing the operations of public schools, as well as provisions of the state and federal constitutions.[11]

The New Jersey Supreme Court held that it was permissible for religious groups to use public school facilities on a temporary basis for a fee, when the religious use occurred at a time the facilities were not required for regular educational activities. No statute barred religious services being conducted in public schools during periods when the facilities were not required for regular educational activities. The board of trustees had wide discretion to permit such use, according to the court, and the legislature intended to endow the district with power to use its buildings for other than regular school use. However, the state constitution did prohibit any lease arrangement between a school board and religious groups which did not fully reimburse the out-of-pocket expenses directly attributed to such nonschool use.

In upholding the school district against the claim that it had violated the establishment clause of the U.S. Constitution in making its facilities available for use by religious groups, the New Jersey Supreme Court applied the traditional *Lemon v. Kurtzman*[12] three part test. The court analyzed the statute to determine if: 1) the statute had a secular purpose; 2) the statute's primary or principle effect was one that neither advanced nor inhibited religion; and, 3) the statute did not foster an excessive government entanglement with religion.[13]

Using this test, the court held that the leases had a secular purpose because they enhanced the use of school facilities for the common benefit of the residents. Second, the court decided that the religious groups' temporary use of school facilities did not have the primary or principle effect of benefiting or advancing religion. Finally, because no significant school administrative functions were involved in such usage and no supervision was needed to insure that religion did not seep into secular instruction, the court concluded that the practice did not support a claim of excessive government entanglement. The court concluded its opinion with the following observation:

> The East Brunswick scheme entails none of the dangers of the establishment of religion by government which the Constitution seeks to prevent. When one takes a calm look at the use of the school buildings by religious groups, the dire predictions of sectarian sponsorship and political divisiveness conjured up by plaintiff seem rather silly.
>
> We hold that religious groups who fully reimburse school boards for related out-of-pocket expenses may use school facilities on a temporary basis for religious services as well as educational classes. We further hold that the courts below erred in requiring these sectarian groups to pay a commercial rental rate and in placing the one-year limitation on their continued use of the school premises.
>
> Subject to the requirement that taxpayers' funds not be expended for the benefit of religious groups, there is no reason why these organizations should not be accorded the same treatment by government as other nonprofit groups.[14]

A similar issue was faced in *Pratt v. Arizona Board of Regents*,[15] in which a citizen challenged the Arizona State University's decision to lease its stadium for a religious rally by the Billy Graham Crusade. The lease did not interfere with the stadium's use for educational purposes and the $40,000 fee was a fair rental value for the lease. The citizens claimed, however, that the Arizona Constitution absolutely prohibited the use of public property in support of any religion, including occasional leases for religious rallies.

The Arizona Supreme Court disagreed, holding that the framers of the state's constitution did not intend to entirely prohibit use of public facilities by religious groups when it is clear that such use does not imply support or favor by the state of that particular religious group. The court concluded with the following statement:

> [T]he twin keys to the use of this stadium for the purpose stated are fair rental value and the occasional nature of the use. The lease to a religious group, on a permanent basis, of property on the University campus, for example would be an entirely different matter because by the permanency of the arrangement, the prestige of the State would be placed behind a particular religion or religion generally. Also, the lease of campus facilities for occasional use, but not for fair rental value, would violate the provision of our Constitution as being an appropriation or application of State property for religious purposes.[16]

Limits on Use of Facilities

There are limits upon the use of school facilities by nonstudent religious groups. Perpetual or apparent long-term use of school facilities may result in violation of the establishment clause. The court in *Resnick v. Brunswick Township*[17] stated in dictum that prolonged use of a school building by a church without evidence of any intention by the church to relocate would constitute a permanent promotion of religion and would violate the establishment clause. Similarly, dictum in the *Southside Estates Baptist Church*[18] states that the power granted to a school board is not unlimited. The court noted that if school property were employed in the permanent promotion of any particular sect or denomination—such as a religious groups' prolonged use of school facility absent any evidence of immediate intentions to construct its own building—such use could also be a violation of the federal Constitution's establishment clause.

Free Speech Claims by Outside Groups

A new line of cases has recently developed in which school districts are being sued by religious groups excluded from rental agreements. These groups claim that the school violates their free speech rights by discriminating against them based on the religious content of their speech. If the schools have created a limited public forum by making those facilities available to other nonreligious, nonstudent community groups, such groups have usually been successful in forcing schools to make their facilities available.

The principle of a public forum is a well settled doctrine. Absent a compelling interest, once a forum is opened to public assembly or speaking to some groups, the government may not prohibit other groups from assembling or speaking on the basis of what they intend to say. Thus, while religious groups have no *per se* constitutional right to use school facilities on demand, when those facilities are otherwise made available for general use by other nonreligious, nonstudent community groups, the religious groups are entitled to equal access. The key factor becomes at that point whether the school policy has been to provide its facilities as an open forum for the community.

Among the first of these cases was *Country Hills Christian Church v. Unified School District.*[19] A religious organization sought a permanent injunction ordering a school district to make school facilities available to it for religious purposes on the same basis as the school district made them available to other groups for nonreligious purposes. By policy, the school district had made the use of its facilities available for a fee to a wide variety of community groups. However, religious groups were permitted to use the facilities only if they were used for nonreligious activities.

In making its decision, the court discussed three issues: First, had the school district created a "public forum" for nonschool groups? The court stated that in allowing its facilities to be used by a wide variety of community groups for diverse purposes, the school district had created a public forum for nonschool groups. Second, having created an public open forum, could the school district exclude from that forum those groups who desired to engage in religious worship? The court ruled that once a forum is opened to assembly or speaking by some groups, a school district may not prohibit other groups from assembling or speaking on the basis of what they intend to say. Third, the court considered whether the establishment clause of the first amendment allowed a school district to deny religious organizations access to school buildings when the religious organizations sought to use those buildings for religious worship. In this case, the school district had claimed that making facilities available to church groups would violate the establishment clause. However, the court applied the three-prong *Lemon* test and concluded that, in this instance, the policy had a secular purpose in opening the schools to the public. The principal or primary effect of the policy would neither advance nor inhibit religion because it made available to all community groups the benefit of school facilities, regardless of the religious nature of their speech. Lastly, the policy would not foster an excessive government entanglement with religion so long as there was a mentality toward religion which permitted religious services to exist without sponsorship by the school district. The court concluded the school district had created a public forum for nonschool groups and having created such a public forum, the school district could not exclude the religious organizations from the use because of the religious content of the intended speech.

This same line of reasoning is followed in *Gregoire v. Centennial School District,*[20] in which a religious group sought relief from a new school policy which prohibited school facilities from being used for any religious services that included the invocation of, worship to, prayer to, or adoration of a deity.

A religious group wanted to rent a school auditorium for an Andre Kole magic performance, at the conclusion of which Mr. Kole delivered a Christian evangelical message. The religious group argued that the school district had created an "open public speech forum" because it continued to allow other outside nonschool-related groups to use its facilities. According to the court, to exclude any applicant who sought to use the facilities to speak about religion would be content-based discrimination against speech in a public forum. Thus, because the school maintained an open public forum for speech, the court held that it could not continue to allow nonreligious outside groups to use its facilities, while excluding religious groups. The court ordered the school to make its facilities available on an equal basis to groups who wished to speak about religion.

Church groups do not always succeed in such open forum arguments. As discussed above in the *County Hill Christian Church v. Unified School District* case, the open forum doctrine is limited by the establishment clause. In the most recent case on this issue, a federal district court upheld a school district's policy excluding a religious group from using its facilities, despite the school district's policy creating a public forum.[21] In *Wallace v. Washoe,* the court cited a compelling state interest in maintaining the separation of church and state under the establishment clause of both the federal and state constitutions.

In the *Wallace* case, a church group was seeking a court order requiring the school district to allow the church to use *permanently* a portion of the high school for religious services during nonschool hours. The court recognized that the school district had created a public forum, but it determined that the school had a compelling interesting in maintaining a separation of church and state. According to the court, this compelling interest justified the school's discriminating on the basis of the religious content of the speech.

In reaching that conclusion, the court applied the three-pronged *Lemon* test to determine if the school district's equal access policy excluding religious groups passed establishment clause muster. The court found that the district's open forum policy—if required to provide facilities to church groups for their permanent place of worship—would have had the primary effect of advancing religion. The church's intention was to convert a portion of the high school into a permanent site for its church services, making the high school "the physical embodiment" of the church. The church had no building site, nor plans to acquire a site or construct a church facility. The court concluded that a reasonable inference could be drawn by students that the school was officially supporting the church. The public also could draw a reasonable inference that the school district supported the church by letting it become permanently institutionalized within the high school. On balance, the court viewed the threat of the "permanent institutionalization" of the church within the high school to be a compelling reason to deny the church's request.

CONCLUSION

The use by outside religious groups of public school buildings and other facilities has been litigated in American courts for more than one hundred years. Cases have evolved from examining such usage under common law and state statutes to the current analysis under the U.S. Constitution's free speech and establishment clauses. Most modern cases apply the *Lemon v. Kurtzman* analysis in generally upholding such use as long as it is on an "equal access" basis with other non-religious users.

The most recent cases deal with efforts by school districts to *restrict* religious group's access to school facilities. The cases in this area are still developing, but the rule seems to be that if a school district has made its facilities generally available to outside groups, it has created a "public forum". In that case, religious groups generally have a free speech right to equal access under the same types of temporary use and rental arrangements. However, church groups seeking to use the facilities on a permanent basis may still find the door barred under establishment clause analysis.

No recent federal appellate court has addressed this issue. Until some definitive statement is issued by the Supreme Court or the circuit courts of appeals, cautious school lawyers will probably advise their clients that the law in this area is "evolving." School districts still have a great deal of flexibility in adopting policies to reflect their community's desires regarding the use of school facilities during nonschool hours on a temporary basis by nonstudent religious groups.

END NOTES

1. 27 Conn. 499 (1858).
2. *Id.* at 506.
3. *Spencer v. Joint School District,* 15 Kan. 259 (1845).
4. *Id.* at 262.
5. Neb. Const. art I. § 4.
6. 95 Neb. 527 (1914).
7. *Id.* at 530.
8. 115 So.2d 697 (Fla. 1959).
9. 432 So.2d 1356 (Fla. App. 1983).
10. *Id.* at 1357-58.
11. *Resnick v. East Brunswick Township Board of Education,* 77 N.J. 88, 389 A.2d 944 (N.J. 1978).
12. 402 U.S. 602 (1971).
13. 389 A.2d at 954-959.
14. 389 A.2d at 960.
15. 520 P.2d 514 (Ariz. 1974).
16. *Id.* at 517.
17. 389 A.2d 944.
18. 115 So.2d 697.
19. 560 F. Supp. 1207 (D. Kan. 1983).
20. 701 F. Supp. 103 (E.D. Pa. 1988).
21. *Wallace v. Washoe County School District,* 701 F. Supp. 187 (D. Nev. 1988).

Religious Garb: May Public School Teachers Wear It?

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The wearing of religious garb by teachers while instructing in public schools has been a controversial issue for many years. Challenges have arisen concerning teachers' rights to wear "religious garb" such as habits, turbans, head scarves, and crucifixes. Indeed, any type of dress, emblem, or insignia indicating that a teacher is a member of a specific religious order probably is subject to challenge as religious garb. Currently, however, there is a conflict of authority among the states on this issue. Some states allow the wearing of garb as an expression of a teacher's religious freedom through the first amendment, while others prohibit it as introducing sectarian religion into the schools.

Religious garb cases have arisen in two distinct ways. A small number of cases have involved challenges to a specific statute or regulation prohibiting religious garb in the schools. A greater number of cases have arisen where no such statute or regulation existed, but where a state's constitutional or statutory provisions prohibited sectarianism in public schools. In both types of cases, the outcomes have differed from jurisdiction to jurisdiction.

CHALLENGES TO STATUTES OR REGULATIONS PROHIBITING RELIGIOUS GARB

The highest courts in both Oregon and New York have upheld provisions prohibiting public school teachers from wearing religious garb while teaching. In *Cooper v. Eugene School Dist. No. 4J,*[1] the Oregon Supreme Court held that the state statute prohibiting teachers from wearing religious dress while teaching violated neither Oregon's guarantees of religious freedom nor the U.S. Constitution's first amendment. Thus, a teacher who had become a Sikh and begun to teach dressed in white clothes and a white turban could have her teaching certificate revoked by the Superintendent of Public Instruction as required by the religious dress statute. The teacher challenged the action on both state and federal constitutional grounds.

The court found wearing religious dress as a regular practice to be incompatible with the performance of a teacher's official professional role.[2] It upheld the statute, in part, because of the impressionable nature of young public school students. It noted that:

> [i]n excluding teachers whose dress is a constant and inescapable visual reminder of their religious commitment, laws like [the religious dress statute] respect and contribute to the child's right to the free exercise and enjoyment of its religious opinions or heritage, untroubled by being out of step with those of the teacher.[3]

The court also considered the impression which religious garb might have upon parents, noting the "concern is that the teacher's appearance in religious garb may leave a conscious or unconscious impression among young people and their parents that the school endorses the particular religious commitment of the person whom it has assigned the public role of teacher."[4]

In *O'Connor v. Hendrick,*[5] the New York Court of Appeals reached a similar conclusion, albeit through different reasoning. Here, the State Superintendent of Public Instruction established a regulation prohibiting teachers from wearing a "distinctive religious garb" while teaching. The court upheld the regulation against a challenge by teachers wishing to wear Roman Catholic garb, noting that the regulation was consistent with the state's constitution and public policy, both of which oppose sectarian influences in the public schools. The court based this holding on its finding that:

> [t]here can be no doubt that the effect of the costume worn by [the teachers] at all times in the presence of their pupils would be to inspire respect, if not sympathy, for the religious denomination to which they so manifestly belong. To this extent, the influence was sectarian, even if it did not amount to the teaching of denominational doctrine.[6]

Accordingly, the court allowed the regulation to stand and, despite its age, the decision continues to be good law in New York today.

In contrast to these cases, the U.S. District Court for the Eastern District of Pennsylvania recently struck down a Pennsylvania religious dress statute.[7] An 1895 statute provided that "no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."[8] The United States Department of Justice challenged the statute under Title VII, alleging both a pattern or practice of religious discrimination and individual discrimination against a Muslim teacher wishing to teach in the head scarf and long dress required by her religion.

The court approached the case as a religious accommodation issue. Thus, the school board had to show that it either had offered a reasonable accommodation to the teacher or was unable to so accommodate her without undue hardship. Upon finding that the board had made no effort to accommodate the teacher's beliefs, the court then examined the nature of the hardship which the school board would encounter by allowing teachers to teach in religious garb.

Using a waiver theory, the court concluded that the board would not incur undue hardship if it violated the Pennsylvania statute and accommodated the teacher's practice of wearing religious attire.[9] The court reached this conclusion because the state had never brought an action to enforce its statute, and the school board itself already had permitted some teachers to wear religious garb or symbols without adverse legal consequences.[10] Thus, the court concluded that the school board was unlikely to get involved in litigation or suffer other hardship over this issue.

The board had argued that it had a compelling interest in avoiding the appearance of endorsing a religion by allowing religious garb. The court rejected this argument and instead noted that it had not "found from the evidence . . . that permitting a public school teacher to wear a scarf required by her religious faith would be likely or probable to create a perception among students that the school, the school district, or the municipal or state governmental entity endorsed the religion of the teacher."[11]

The court also rejected the argument that accommodating the teacher's religious practice would violate the establishment clause of the first amendment. It reached this conclusion on the grounds that allowing religious garb (1) has a secular purpose, which is to comply with Title VII; (2)does not have as its principal or primary effect the advancement or inhibition of religion; and (3)does not foster excessive government entanglement with religion.[12]

As these decisions indicate, courts have taken a variety of approaches in deciding religious garb cases where statutes and regulations are involved. It is important to note, however, that only the case brought under Title VII was successful in striking down a prohibition against religious garb. Accordingly, school districts with similar regulations or statutes may have to defend them against Title VII challenges. In that event, school districts should be prepared to show that accommodating a teacher's need to wear religious garb would cause undue hardship to the schools.

CHALLENGES TO RELIGIOUS GARB ABSENT A PROHIBITING STATUTE OR REGULATION

Where no explicit provision prohibiting religious garb exists, the wearing of such attire by teachers may be challenged on the grounds that it introduces sectarianism into public schools. However, the weight of authority suggests that, in the absence of a statute or regulation, allowing teachers to wear religious garb does not convert a school into a sectarian school.

This conclusion was reached most recently by the Ohio Supreme Court. In *Moore v. Board of Education,*[13] a taxpayer argued that the defendant school board had introduced sectarian religion into its schools by permitting some of its teachers to wear the Catholic habit or related clothing while teaching. The court, citing several cases with the same outcome, upheld the teachers' freedom to dress according to their religion. Specifically, the court noted that "the wearing of the religious habit or garb by some of the defendant's teachers, in and of itself, does not convert the school at which they teach into a sectarian school or create sectarian control within the purview of the Constitution."[14]

The Court of Appeals of Kentucky reached the same conclusion in *Rawlings v. Butler.*[15] In that case, a taxpayer questioned the right of the State Superintendent of Public Instruction and several boards of education to spend public tax money on the salaries of nuns teaching in the public schools while dressed in habits and wearing rosaries. In rejecting the taxpayer's contention, the court held that the nuns' dress should not deprive them of the right to teach in public schools, as long as they did not "inject religion or the dogma of their church." [16] The court further recognized that:

> [t]he religious views of these sisters and their mode of dress are entirely personal to them. If they were prevented from teaching in the public schools because of their religious beliefs, then they would be denied equal protection of the law in violation of the fourteenth amendment of the Federal Constitution.[17]

Courts in other states also have permitted religious garb to be worn by Roman Catholic individuals while teaching in public schools. These earlier cases include *New Haven v. Torrington, State ex rel. Johnson v. Boyd,* and *Gerhardt v. Heid.*[18]

Significantly, however, each of these cases contained no attempts by the teachers in question to teach or explain their religion to students during class time. Therefore, it is reasonable to assume only that courts in these states will tolerate religious dress alone; where such dress is combined with attempts to proselytize, a different result probably would occur.

In contrast to the above cases, some authority suggests that, even absent a specific statute or regulation forbidding it, religious garb may be prohibited for teachers teaching in public schools. For example, in *Zellers v. Huff,*[19] several taxpayers sought to enjoin public school teachers from wearing religious habits. The court granted the injunction, stating that "[n]ot only does the wearing of religious garb and insignia have a propagandizing effect for the church, but by its very nature it introduced sectarian religion into the school."[20]

Other cases suggesting that religious garb will not be tolerated for teachers in public schools arose in the context of suits to determine whether a particular school is a private or parochial school for tax purposes. Where teachers wore distinctive religious garb, the courts found the schools to be under sectarian control.[21] However, in each case the religious garb was only one of several factors leading to this result. In *Knowlton,* for example, teachers were teaching the catechism in addition to wearing habits. In *Berghorn,* on the other hand, nun-teachers wearing clothing and symbols of their religious orders, were among other things, conducting religious services at churches located on the school grounds. Thus, it cannot be inferred that the wearing of religious garb alone is enough to convert a school into a sectarian institution.

CONCLUSION

The permissibility of religious garb worn by teachers in public schools remains a controversial issue today. Courts have employed several theories in deciding the cases which have arisen, and have reached conflicting conclusions.

Based upon the cases, though, it appears that courts are likely to prohibit teachers from wearing religious garb only where there is a state statute or regulation to that effect. However, even this conclusion seems likely to change if more teachers bring religious discrimination actions under Title VII. In those cases, schools will be required to show that allowing teachers to teach in religious garb would cause their institutions to suffer undue hardship, a standard which generally requires evidence of specific detriment to the school and students from allowing the teachers to wear such attire.

Where no statute or regulation prohibits religious attire for teachers, it is likely that courts will allow such garb. The courts are likely to find that religious attire alone is not sufficient to violate regulations prohibiting sectarianism in the schools. Only where the dress is combined with other religious activities (e.g., preaching or praying), are courts inclined to prohibit it in the absence of a formal prohibition against religious dress for teachers.

END NOTES

1. 301 Or. 358, 723 P.2d 298 (1986) *appeal dismissed,* 480 U.S. 942 (1987).

2. 301 Or. at 381, 723 P.2d at 313.

3. *Id.* at 376, 723 P.2d at 310.

4. *Id.* at 380-81, 723 P.2d at 313.

5. 77 N.E. 612, 184 N.Y. 421 (1906).

6. *Id.* at 614, 184 N.Y. at 428.

7. *U.S. v. Board of Education,* 50 Fair Empl. Prac. Cas. (BNA) 71 (E.D. Pa. 1989).

8. *Id.* at 73.

9. *Id.* at 81.

10. *Id.*

11. *Id.* at 81-82.

12. *Id.* at 82.

13. 4 Ohio Misc. 257, 212 N.E.2d 833 (1965).

14. *Id.* at 270, 212 N.E.2d at 841.

15. 290 S.W.2d 801 (Ky. 1956).

16. *Id.* at 804.

17. *Id.*

18. 132 Conn. 194, 43 A.2d 455 (1945), *rev'd on other grounds,* 134 Conn. 260, 56 A.2d 650 (1947) (trial court's conclusion that school is public was not erroneous as a matter of law, though several of the teachers wore Roman Catholic habits in the classroom); 217 Ind. 348, 28 N.E.2d 256 (1940) (the fact that the teachers in question wore the robes of various religious orders while teaching does not constitute "sectarian teaching"); 66 N.D. 444, 267 N.W. 127 (1936) (the mere wearing of religious garb, where there was no attempt to give instruction in religious or sectarian subjects, violates no provision of the state constitution).

19. 55 N.M. 501, 236 P.2d 949 (1951).

20. *Id.* at 525, 236 P.2d at 964.

21. *Berghorn v. Reorganized School Dist.,* 364 Mo. 121, 260 S.W.2d 573 (1953); *Knowlton v. Baumhover,* 182 Iowa 691, 166 N.W. 202 (1918).

Home Schooling

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INTRODUCTION

Historically, the education of children in the United States was a matter of parental discretion. Decisions to educate or not to educate, and the substance of that education, were made by the parents as a right. After the Civil War, the states began to preempt what had traditionally been viewed as a parental prerogative. By 1900, all the northern states had adopted some form of compulsory attendance statute. Southern states were a bit slower to respond, but eventually they, too, followed the trend for mandatory attendance. Today every state has some form of compulsory attendance statute. This chapter will focus on the return to home instruction by families to whom the public schools have become either sinful or irrelevant, and their inevitable conflict with the states' compulsory attendance policies.

CONSTITUTIONAL FRAMEWORK

The right of the state to require education under the federal Constitution is well accepted, but the extent to which that right may be exercised is not unlimited. The Supreme Court defined the boundaries of state power in several cases dating back to the 1920's: *Meyer v. Nebraska,*[1] *Pierce v. Society of Sisters,*[2] *Farrington v. Tokushige,*[3] and *Wisconsin v. Yoder.*[4]

In *Meyer,* the Court held unconstitutional a Nebraska statute that prohibited the teaching of a modern language other than English to students who had not completed the eighth grade in any private, parochial, or public school. A private school instructor was convicted for teaching German to a child who had not advanced beyond the eighth grade. The Court struck down this transparently anti-German, jingoistic statute, ruling that it violated the defendant's right to teach, the student's right to learn, and the parents' rights to choose, within bounds, what their children would be taught. Regarding these rights as liberties protected by the due process clause of the fourteenth amendment and recognizing "[t]he power of the State to compel attendance at some school and to make reasonable regulations for all schools,"[5] the Court found Nebraska's statute to be unreasonable and arbitrary.

Two years later, in *Pierce,* the Court ruled that an Oregon statute compelling attendance at public school, without providing for a private school alternative, "unreasonably interferes with the liberty of parents and guardians to direct the . . . education of children under their control."[6] Although the plaintiffs were private school corporations seeking injunctive relief from Oregon's essentially "public school only" compulsory attendance law, the Court acknowledged the right of parents to have some choice in the education of their children.

The principle established in *Meyer* and in *Pierce,* limiting the power of the state to control the terms and content of education, was relied on again by the Court in *Farrington,* a 1927 decision applying the due process clause of the fifth amendment to strike down stringent laws regulating Hawaii's private schools. The express purpose of the Hawaii statute was to assimilate a large alien population and to promote Americanism. The act, together with the implementing regulations, gave the territory pervasive power over foreign language (mostly Japanese) schools. The *Farrington* Court acknowledged there was a right to regulate private schools, but that right could not be so extensive as to effectively eliminate the alternatives offered by private schools. The Court held that the state cannot excessively control the curriculum of nonpublic schools, so as to rob them of their character as alternatives to public schools.

These three Supreme Court decision established the due process limits on the right of the state to require and regulate education. The issue of state power versus parental power remained relatively dormant for almost half a century until the Supreme Court squarely confronted the issue again in *Yoder*. In the earlier cases the Court had relied on due process, specifically the freedom to choose educational alternatives, but in *Yoder* the Court applied the first amendment right to the free exercise of religion. Affirming the Wisconsin Supreme Court's reversal of a conviction of Amish parents for violating the state's compulsory attendance law, the Court held:

> [the] State's interest in universal education . . . is not totally free from a balancing process when it impinges on [other] fundamental rights . . . such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.[7]

While this ruling might appear to be a rather significant limit on the power of state versus the power of the parent, the Court was quite careful to narrowly circumscribe its scope. The Court insisted that in order to trigger constitutional protection, the parental interest must be religious in nature rather than philosophical or personal. The religious interest must pose a real, rather than perceived, threat to the religious interests involved and the disruption to the child's education should not seriously impair the child's future nor should it threaten the public order in any significant way. In order to tip the balance away from the strong state interest in compulsory education, the parents would have to satisfy all of these narrowly defined criteria.

Based on uncontested evidence, the Court in *Yoder* found an interdependence between Amish fundamental religious tenets and the self-sufficient Amish way of life that was clearly threatened by continued attendance in secular schools. There was also no dispute as to the sincerity of the Amish claims, nor that they were religious in nature rather than philosophical or personal values. The Court emphasized it was "not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life."[8] Furthermore, the Amish parents only wanted to remove their children from public schools after the eighth grade. Thereafter, they would continue to be educated in Amish schools "characterized by the undisputed testimony of expert educators as 'ideal' vocational education."[9] The Court concluded the Amish system would not harm the child in any significant way, nor would it threaten the public safety, peace or order.

Meyer, Pierce, Farrington, and *Yoder* combine to form the legal framework for the power of the state to require and regulate education. While not dealing specifically with the right of home instruction, these cases form the constitutional backdrop against which home instruction cases are viewed.

CONSTITUTIONAL CHALLENGES

Increasingly, parents who are prosecuted for instructing their children at home are attacking compulsory school attendance statutes on constitutional grounds. They seek to expand the narrow boundaries of *Meyer, Pierce, Farrington,* and *Yoder* to establish a broad constitutional right to home instruction.

Religious Claims

In many of the home instruction cases, parents have removed their children from school for religious reasons. Prosecuted for violating the compulsory attendance laws, these parents have argued that they have a protected first amendment freedom to educate their children according to their religious precepts and values. The most recent court decisions provide continued confirmation of the largely unavailing scope of the *Yoder* decisions. For example, in *Howell v. State,*[10] a Texas intermediate appellate court rejected *Yoder* protection for parents who argued that their religious convictions required them to educate their children at home. In *State v. Schmidt,*[11] the Ohio Supreme Court held that the state statute, which required that home education programs be approved by the local school superintendent, did not violate the Free Exercise Clause. Similarly, North Dakota's highest court held in

State v. Patzer,[12] that the teacher certification requirement in the state's home schooling statute did not violate the Free Exercise Clause. Other recent decisions have similarly rejected parents' Free Exercise challenges.[13]

Before *Yoder,* the Free Exercise arguments for home instruction were also consistently rejected by the courts. Given the narrowness of the ruling in *Yoder,* the Free Exercise argument has met with negligible success ever since. The reasons have varied. In some instances parents have not presented enough threshhold evidence to show that their interest was religious in nature. In others, even though the interest was religious in nature, it still did not rise to the level required by *Yoder* to trigger preponderant constitutional protection.

On the other side of the ledger, in two Ohio cases parents successfully employed the *Yoder* defense in gaining reversals of their convictions by the state's highest court.[14] However, both cases involved instruction in unaccredited, religiously-affiliated schools rather than home education. In both cases, the parents were convicted of failing to send their children to state-approved schools, choosing instead to educate them at nonpublic, religiously-oriented schools which did not conform to the "minimum standards" promulgated by Ohio's State Board of Education. The group of parents in *Whisner* were "born again" Christians who maintained that attendance in schools adhering to Ohio's minimum standards was incompatible with their religion. The defendant in *Olin,* although not Amish, sent his daughter to an unaccredited Amish school, fearing that if she were educated according to the "humanistic" unchristian values mandated by Ohio's minimum standards, he would subject himself, and his daughter, to eternal damnation.

In both cases, the Ohio Supreme Court concluded that the claims satisfied the rigid criteria established in *Yoder.* The court accepted that the beliefs were religious in nature, rather than philosophical or personal. The beliefs were sincerely and deeply held, and there existed a strong interdependence between the educational experience and the inculcation of the parental religious values. The court also found the application of the minimum standards to nonpublic schools, while not a direct regulation as in *Farrington,* indirectly allowed the state to control the content and terms of education in Ohio including the curriculum, the method of hours of instruction, the teacher, the physical plant, and even the educational policies. The court concluded the result was the "obliteration" of the distinction between public and nonpublic schools and the "absolute suffocation" of religious education.

An unpublished Michigan decision seemed to suggest that the Ohio opinions were directly applicable to cases where parents instruct their children at home. In *State v. Nobel,*[15] the court held that the religious interests of the defendants in educating their children at home overrode Michigan's statutory requirements of teacher certification. Because Mrs. Nobel possessed all the qualifications necessary for teacher certification but refused on religious grounds to obtain it, the court found the requirement a mere formality. Relying on *Whisner,* the court reasoned that because of the religious nature of the defendants' claim and because the superfluous nature of her certification, the requirement was an undue restriction on the defendants' religious freedom.

However, the case law has clearly crystallized against this view. In addition to the aforementioned body of recent court decisions, other post-*Olin* cases have specifically addressed parent free exercise challenges to requirements concerning the qualifications of the home teacher. A few states (Iowa, Michigan, and North Dakota) require all teachers in home schools to possess a teaching certificate. This requirement has been controversial enough to cause the Iowa legislature to place a moratorium on the enforcement of certification requirements until the matter could be studied further.

Michigan's statute requiring teacher certification of all individuals providing instruction was challenged in 1980 and again in 1986. In the home school case *Hanson v. Cushman,*[16] the federal district court found the statute to be reasonable because the parents had not proven that any of their fundamental rights had been violated. In the private school case *Sheridan Road Baptist Church v. Department of Education,*[17] parents challenged the certification requirement as a burden on the Free Exercise of religion. Michigan's highest court rejected that argument, regarding certification as a minimal burden that was outweighed by the state's interest in providing proper education.

North Dakota's statute regarding teacher certification has also been under attack in recent years. In 1980, the statute was upheld because the court found no evidence that the family's religious convictions would be affected.[18] In a subsequent case, North Dakota's highest court conceded that the certification requirement imposed a burden on religion, but concluded that the burden was outweighed by the compelling state interest in sufficient educational quality, as legislatively determined to include certified teachers.[19] This statutory requirement was again upheld, with the court ruling that this requirement was the least intrusive means of ensuring that children are taught by competent staff. More recent North Dakota decisions have consistently continued to maintain this position.[20]

Nonreligious Claims

Nonreligious grounds for attacking compulsory attendance laws have been based primarily on fourteenth amendment due process and the fourth amendment's prohibition on unreasonable searches and seizures.

The fourteenth amendment substantive due process arguments have derived from *Pierce,* where the Supreme Court recognized a parental right "to direct the upbringing and education of children under their control."[21] More recently, the courts have regarded parental control over children and their education as protected by a right of privacy secured by the ninth amendment as well as by the due process clause of the fourteenth amendment.[22] There is some disagreement in the cases as to the standard of the review to be applied to such challenges. In *State v. Shaver,*[23] North Dakota's highest court applied a rationality test, while in *In re Charles,*[24] Massachusetts' highest court subjected the law to a higher degree of scrutiny. Regardless, in general, such challenges have not been successful because of the paramount state interests in education.[25]

The minor exception started with the unreported Massachusetts' decision of *Perchemlides v. Frizzle.*[26] After local school authorities rejected their home instruction program, the parents claimed the rejection violated their constitutional and statutory right to educate their child at home. The parents had removed their six-year-old son from school because they were dissatisfied with the education he was receiving and were convinced they could give him a superior education at home. Their decision was not religiously motivated. The Massachusetts statute exempted from public school attendance a child "otherwise instructed in a manner approved in advance by the superintendent or the school committee."

In 1893, the Massachusetts Supreme Judicial Court, applying a slightly different statute, had construed the language "otherwise instructed" to include home instruction as an exemption, provided it was "given in good faith and sufficient in extent."[27] On the basis of the statutory language and the earlier case, the court concluded that "[w]ithout doubt, then, the Massachusetts compulsory attendance statute might well be constitutionally infirm if it did not exempt students whose parents prefer alternative forms of education."[28] Without identifying a specific constitutional amendment, the court attributed the potential infirmity to a right of privacy independent of the first amendment. The court included within the notion of privacy the right of "non-religious as well as religious parents . . . to choose from the full range of educational alternatives for their children.[29] Presumably contained within this right was a constitutionally protected choice of the alternative of home instruction.

In a more recent Massachusetts case, *In re Charles,*[30] the Supreme Judicial Court recognized that parents have a constitutional right to direct the education of their children. However, the court upheld state regulations requiring parents to seek approval by submitting a home schooling proposal outlining the curriculum, materials and qualifications of instructors. This approval requirement was designed to promote the state's substantial interest in ensuring the education of its citizens, and therefore such approval process did not infringe upon the parents' constitutional rights to direct the education of their children.

Vagueness challenges have resulted in divergent results. Two recent federal court decisions are good examples. In *Blackwelder v. Safnauer,*[31] a New York federal district court rejected a vagueness challenge to New York's requirement that minors taught at home receive instruction from a "competent" teacher that is at least "substantially equivalent" to instruction provided to students in the public schools. In contrast, in *Jefferey v. O'Donnell,*[32] a Pennsylvania federal district court upheld a vagueness challenge involving a similarly worded statute. In *Blackwelder,* the court conceded that the terminology of the statute was nebulous standing alone, but relied on standards found elsewhere to breathe content into the requirement. The court noted extensive regulations promulgated by New York's Department of Education establishing minimum requirements for public schooling, sufficient to serve as a guide for determination of "equivalence." Moreover, the state had promulgated advisory guidelines for home schooling which described appropriate qualifications and background for teachers and curriculum in the home. An administrative process was also available to resolve disputes in individual cases. In striking down Pennsylvania's statute, the court in *Jeffrey* observed that there were no standards in that state for determining qualifications of home tutors or equivalency of curriculum, such decisions having been left to the unbridled discretion of local administrators. Pennsylvania recently adopted new legislation to make the procedures and criteria constitutionally clear.

The parents in *Blackwelder* also pressed a fourth amendment claim based on the school districts' policy of home visits to verify the adequacy of home schooling programs. The parents contended that these visits were warrantless "searches" within the meaning of the fourth amendment, not falling within any exception to the warrant requirement.

Indeed, the court found that these visits were "searches" for constitutional purposes, but upheld them based on the exception for consent. In focusing on the reasonableness of the searches, the court declined to justify them by reference to the "regulatory search" cases justifying warrantless searches when "closely regulated industries" are subject to detailed regulatory schemes.[33] The court also distinguished *Wyman v. James,*[34] which upheld the reasonableness of home visits by social service caseworkers in limited circumstances. The court upheld the visits, however, by finding a consent on the part of the parents, since the evidence showed that inspections were never conducted when the parents objected. After the district court's opinion was issued, the New York State Board of Regents adopted authorizing such visits only after a family's home schooling program has been placed on probation and the local superintendent has "reasonable grounds" to believe that the program is not in compliance with state requirements.

In sum, parents do not have a broad religious or nonreligious constitutional right to home instruction. States retain the power to compel attendance at public or private schools and to regulate reasonably the terms of education. *Wisconsin v. Yoder* offers small support for a first amendment claim to home instruction; the vast majority of such suits have failed to satisfy the Court's criteria. With the exception of vagueness, other constitutional theories attempting to limit state power to regulate home instruction have been similarly unsuccessful.

STATUTORY ANALYSIS

Like many issues in education law, the law of home instruction is largely dependent upon state statutes. Much of the relevant case law is comprised of state court decisions interpreting compulsory education statutes, state policies, or regulations. The statutory backdrop for home instruction is a shifting landscape. The overwhelming majority of home instruction statutes or regulations have been passed between 1982 and 1988. Although there have been some exceptions, the overall trend in recent years has been in favor of home instruction, making it an explicit exception to compulsory education under specific circumstances or criteria.

An up-to-date compilation of state statutes and regulations by the Home School Legal Defense Association (HSLDA)[35] reveals that over 32 states have explicit exceptions for home instruction. Of these states, apparently half require home schools to be "approved" by the local school district; five require home teachers to be "competent," "qualified," or "capable of teaching"; and only three require home schools to utilize certified teachers. Whereas three states require home instruction to be "regular and thorough, seven states require instruction to be "comparable" to public schools.

The definition of home schools has also been an issue of debate. In the view of the HSLDA, which is on advocacy organization, statutory language in at least thirteen states permits home schools to designate themselves and operate as private schools or religious schools. According to the HSLDA, in another six states, home schools may qualify as private schools or church schools.[36]

Monitoring student progress and achievement has also been an issue in the passage of home instruction laws. According to the same source, 25 states require standardized testing, but they do not necessarily require submission of the results.[37] Several other states require district testing. Six states provide an alternative to testing.

The state case law can best be understood within the framework of three basic types of statutes. Some compulsory education statutes, referred to here as the "no-exception" type, require attendance within certain ages at public or private schools only. Other compulsory attendance statutes, referred to here as the "implied exception" type, provide another alternative with broad language like "equivalent instruction elsewhere." The third type provides an express exception for home instruction.

Category One Cases: "No Exception" Statutes

The cases occurring in jurisdictions that require attendance in public or private schools without any express or implicit exception for home instruction have tended to cluster around two dominant issues — constitutionality (discussed above) and eligibility of home instruction as a private school. The courts have split about equally on whether home instruction qualifies as a private school.

In *State v. Counort*[38] one of the earliest cases to interpret "private school" narrowly, the defendant was convicted for refusing to allow his two children to attend a local public school or an approved private school, as required by Washington's compulsory attendance statute. The father appealed, claiming he was experienced as a teacher, capable of teaching all branches required to be taught in the public schools, and that he maintained a private school at home for his daughters. The Washington Supreme Court rejected his appeal, finding the evidence did not show that he maintained a private school at his home. Commenting on the distinction between home instruction and a private school, the court stated:

> Such a requirement means more than home instruction. It means the same character of school as the public school, a regular, organized and existing institution, making a business of instructing children of school age in the required studies and for the full time required by the laws of this state .... The parent who teaches his children at home, whatever be the reason for desiring to do so, does not maintain such a school.[39]

For home instruction to be acceptable under this interpretation, it would seem to have become so institutional in character as to lose any intimate, homelike quality.

The rationale for denying home instruction a private school status was sharpened in *State v. Hoyt.*[40] The children in that case were instructed in their homes by private tutors in the courses required to be taught in the public schools to children of their age. The New Hampshire Supreme Court rejected the contention that such instruction qualified as a private school. Home instruction could not be comparable to institutional instruction because it necessarily lacked the socialization a child would acquire in the group learning experience. Home instruction would also place an unreasonable administrative burden on the state to supervise the various home learning experiences and therefore could not qualify as a private school.

Although the socialization rationale has not been frequently relied on in modern decisions, it was at least implicit in the Kansas Supreme Court's decision in *State v. Lowry.*[41] The only question before the court was whether the defendants' home instruction program constituted a private school and therefore exempted them from the compulsory school attendance law. Affirming the convictions, the court concluded the defendants were not operating a private school. The court based its conclusion on the defendants' failure to fulfill all the statutory curriculum requirements and on the absence of an appropriate institutional atmosphere.

Approximately the same number of courts within the no-exception jurisdictions have interpreted attendance at public or private school broadly to include home instruction, provided it was equivalent to that offered in the public schools. In *State v. Peterman*[42] the court ruled that home instruction qualified as a private school under Indiana's public-or-private-school-only compulsory attendance law. Emphasizing the educational rather than the social aspect of "school," the court stated:

> A school, in the ordinary acception of its meaning, is a place where instruction is imparted to the young. If a parent employs and brings into his residence a teacher for children, and such instruction is given as the law contemplates, the meaning and spirit of the law have been fully complied with .... We do not think the number of persons, whether one or many, make a place where instruction is imparted any less or more a school.[43]

Almost fifty years later, the Illinois Supreme Court relied on *Peterman* in *People v. Levisen.*[44] This case best illustrates a broad interpretation of "private school" to include home instruction. Convicted under the Illinois public-or-private-school-only compulsory attendance law, the Levisens appealed, claiming the state had failed to prove their child was not attending a "private school" within the intent of the legislation. The Levisens, Seventh Day Adventists, were instructing their seven year old daughter at home because they believed instruction with other children produced a competitive, "pugnacious" character, and that the public school atmosphere was not conducive to fostering faith in the Bible. They also believed that for the first eight or ten years of life, the field or garden was the best schoolroom, the mother the best teacher, and nature the best lesson book. Motives aside, the evidence indicated that Levisen's daughter was receiving equivalent or superior instruction at home for five hours a day in all the required courses, and that she showed a proficiency comparable to her third grade peers.

Reversing the convictions, the court agreed with the parents' contentions that school is a place where instruction is imparted; its existence is not dependent on the number of persons being taught. The court also noted, "[t]he object is that all children shall be educated, not that they shall be educated in any particular manner or place."[45] According to the majority in *Levisen,* academic training, not the development of social skills, was the *sine qua non* of school. The dissent, referring to the *Counort* decision, argued that allowing home instruction would thwart the legislature's intent and would "do violence to the letter and the spirit of the law."[46]

In a subsequent decision, a federal district court in *Scoma v. Chicago Board of Education,*[47] reasserted *Levisen's* holding that home instruction could, so long as commensurate with public school standards, qualify as a private school. However, the court balked at going beyond *Levisen,* rejecting the parent's contention that home instruction was a fundamental constitutional right. In two recent unreported cases, courts found home instruction programs to meet the private school option in Colorado and Texas compulsory education statutes.[48]

Overall, Category One cases reflect a clear and almost equal split between the *Levisen/Scoma* view and the *Hoyt* position. This issue is replayed in the equivalency context in Category Two cases.

Category Two Cases: "Equivalency" Statutes

Cases dealing with Category Two statutes greatly outnumber the cases in Categories One or Three. In part, the large number of cases is directly attributable to the ambiguity of Category Two statutes. The larger number of cases may also be explained by the adoption of this type of statute in many of the more populous states. These statutes do not expressly limit instruction to public or private schools, nor do they expressly provide for home instruction. Rather, the statutes provide an exemption from public school attendance with ambiguous terms like "equivalent instruction elsewhere." Commonly occurring issues include: a) what standards are employed to measure equivalence; b) who has the burden of proving equivalence, the state or the parent; and c) who determines equivalence, the court or school authorities.

Because of the ambiguity of statutory language like "equivalent instruction elsewhere," courts have sometimes concluded that home instruction is not a permitted exemption in jurisdictions with this type of compulsory attendance statute. Although a majority of courts have held home instruction qualifies under the equivalence exemption, a substantial minority, adopting the socialization rationale of *Hoyt,* have concluded home instruction is not equivalent to the institutional, group learning experience.

Commonwealth v. Roberts[49] was probably the earliest case in which the equivalence issue was discussed. Reversing the conviction of the defendant, Frank Roberts, the Massachusetts Supreme Judicial Court interpreted the statutory language "otherwise instructed for a like period of time in the branches of learning required by law" to include equivalent instruction offered in other than a public or approved private school. Although the defendant's daughter was instructed in a private unapproved school, the court, *in dicta,* recognized the right of parents to instruct their child at home so long as the education was equivalent and offered in good faith. In construing the statutory exemption broadly, the court reasoned the goal of the law was that "all the children shall be educated, not that they shall be educated in any particular way."[50] The *Roberts* academic-only interpretation of this type of statute reflects the majority view, although a substantial minority of courts have followed the *Hoyt* rationale.

The judicial evolution of this issue is clearly reflected in a series of decisions in New Jersey. Interpreting the statutory language, "equivalent instruction elsewhere than at public school," New Jersey courts have come up with completely opposite conclusions. In two older cases, *Stephens v. Bongart*[51] and *Knox v. O'Brien*,[52] the language was interpreted to require an equivalence not only in terms of academic input but also in terms of social development. In a more recent case, *State v. Massa*[53] the court reasoned and interpreted the same language to require only academic equivalence. During the same decade, the New Jersey Supreme court implied that home instruction could qualify as an exemption from public school attendance.[54]

In *Stephens*, the trial court found the parents to be disorderly persons for instructing their two sons at home rather than sending them to school as required by law. While the evidence indicated their home instruction was not academically comparable to that offered in the public school, the judge preferred to rest his decision on the broader basis of the inherent lack of equivalence of home instruction, stating:

> I incline to the opinion that education is no longer concerned merely with the acquisition of facts . . . A primary objective of education today is the development of character and good citizenship. Education must impart to the child the way to live. This brings me to the belief that . . . it is almost impossible for a child to be adequately taught in his home. I cannot conceive how a child can receive in the home instruction and experiences in group activity and in social outlook in any manner or form comparable to that provided in the public school.[55]

The trial court in *Knox* elaborated on the view that home instruction could not be equivalent to an institutional group-learning experience. Holding the defendant guilty of being a disorderly person for instructing his two children at home and not sending them to school, the court explained:

> The underlying philosophy of modern life is that people, through social intercourse with one another, shall live in amity, and to absorb unto ourselves that which is good in our neighbor, and to shun that which is bad . . . Research discloses that even the siblings of royalty were encouraged under supervision to have contact with the commoner. The entire lack of free association with other children being denied to Mark and Eileen, by design or otherwise, which is afforded them at public school, leads me to the conclusion that they are not receiving education equivalent to that provided in the public schools in the third and fifth grades.[56]

This rapsodic view of the benefits of public school socialization was apparently not shared by the Massas, who removed their daughter from public school and instructed her at home. Fined $2,490 by a local magistrate for failing to comply with New Jersey's compulsory school attendance law, the Massas appealed and were granted a trial *de novo*. As framed by the court, the central issue in this case was equivalence; specifically, what the word "equivalent" meant in the context of the New Jersey statute. Unequivocally rejecting the earlier interpretation of the statute, the *Massa* court said:

> [T]he [*O'Brien* court] interpreted the word "equivalent" to include not only academic equivalency but also the equivalency of social development. This interpretation appears untenable in the face of the language of our own statute and also the decisions in other jurisdictions.[57]

Interpreting the New Jersey statute as requiring only academic equivalence, the *Massa* court ruled home instruction was permissible. Based on the evidence presented, the court found the defendants' home instruction program was academically equivalent, in large part because the state had failed to provide the reverse, and overturned the municipal court's conviction. The view expressed by the *Massa* court that "equivalent instruction elsewhere," or other such language refers only to academic equivalence, has been, by a narrow margin, the favored and more recent view.

When home instruction has not been excluded *per se* as an alternative, the issue frequently shifts to what standards or criteria are used to measure equivalence on a case-by-case basis. Generally, courts are guided by their state's statute if it sets out standards for determining equivalence. Those provisions vary from a single requirement, such as teacher competence, to a much more elaborate and detailed set of standards.

One of the standards most frequently at issue in determining the equivalence of home instruction programs has been teacher qualifications. Where the statute has not provided a teacher qualification standard, courts have usually implied a requirement of teacher competence but not teacher certification. For instance, in *Massa,* the court refused to require that Mrs. Massa have state certification. In fact, the court was satisfied that Mrs. Massa, who did most of the instruction, was qualified to teach her daughter the basic subjects from grades one to eight even though her formal education did not go beyond high school, and even though she had no prior teaching experience. The judge concluded that Mrs. Massa was a competent teacher based on his observation of her while testifying and during oral argument.

Other courts, such as in *Perchemlides* and *Roberts,* applying statutory provisions like New Jersey's, have similarly implied that teacher competence, and not teacher certification, was all that was required. For instance, in New York, where the statute only called for teacher competence, several decisions involving the qualifications of the teacher have held the standard did not demand teacher certification.[58]

When the statute specifies teacher qualifications, however, courts have scrupulously followed the statutory requirement. For example, in *State v. Moorhead,*[59] the defendants contended it was unclear whether the term "certified teacher" meant the teacher must be "certified" by a licensing agency or merely "competent." Summarily dismissing the argument, Iowa's Supreme Court referred the defendants to the certification requirement established by the board of public instruction, and stated, "[t]he term should cause no difficulty for citizens who desire to obey the statute."[60]

Sincerity and good intentions were not enough in *Thomas H.*[61] Convicting the defendants of neglect for failing to send three of their children to school, placing the children under court order to attend school and the parents on probation for eighteen months, the court applied New York's standards strictly and literally. The sole issue before the court was the academic equivalence of the defendants' home instruction program. Both parents were well educated. The evidence clearly indicated that parents were making a good faith, conscientious effort to train their children in an alternative, if somewhat offbeat, manner; however, the instruction was not systematic. It was admitted that United States and New York history were not given much attention, although numerous field trips were taken to points of historical interest. A psychological evaluation of the three children indicated all three had above average intellectual ability and advanced reading skills. The New York court refused to accept what some might consider an ideal learning experience. Finding the defendants' home instruction did not satisfy New York's standards, the court concluded it was not substantially equivalent.

The Massachusetts statute that was applied in *Perchemlides*[62] provides an exemption for children who are "otherwise instructed in a manner approved in advance by the superintendent or the school committee." Although the court acknowledged it was outside its purview to set the standard for the local school authorities, it nevertheless instructed the school committee to consider certain factors and completely disregard others in evaluating a proposal for home instruction. Factors to be considered were teacher competence (not necessarily certification), the number of hours and days devoted to instruction, subjects taught, adequacy of education materials and availability of periodic tests for measuring academic progress. Factors to ignore were the parents' motives, the lack of a curriculum identical to that provided in the public schools, socialization, and the creation of a precedent for future home instruction proposals if the plan was approved. No court has followed the lead of *Perchemlides* in imposing such a specified set of factors upon local school authorities in the absence of statutory direction.

Unless a state statute has expressly provided otherwise, courts have generally determined for themselves whether a home instruction program was equivalent.[63] Where the statute provides that an administrative agency is to evaluate instruction elsewhere for equivalence, courts in at least three jurisdictions have refused to usurp that statutory authority.[64] For example, in *Commonwealth v. Renfrew,*[65] the Supreme Judicial Court of Massachusetts affirmed a judgment against the parent-defendants who had not obtained approval for their home instruction program from the local school superintendent or school committee as required by statute. The Renfrews contended they were giving their child equivalent instruction at home and attempted to introduce evidence to that effect. The court refused to even consider the evidence of equivalence, stating "[h]ome education of their child by the defendants without the prior approval of the superintendent or the school committee did not show a compliance with the statute."[66] Whether the Renfrew court would allow evidence on equivalence following a disapproval by the local authorities was not addressed.

Burden of Proof

Another frequently encountered issue is the question of who has the burden of proving equivalence, or the lack thereof, of a given home instruction program. Where the statute specifically allocates the burden of proof, courts have consistently followed the statute's directives. For instance, New York's statute, which places the burden on the parent, has been strictly adhered to in all of the recent home instruction cases.[67]

Burden of proof was central in *In re Falk*.[68] The Falks, high school graduates with some technical training but no previous teaching experience, removed their nine-year-old son from school and were instructing him at home. They were philosophically opposed to the group learning experience, viewed routines and regulations of public school skeptically, and felt public school "over-stimulated" their son. Restating the New York position that "the onus of demonstrating that the home instruction is substantially equivalent education falls [on the parents] . . . ,"[69] the court was satisfied that the parents had sustained their burden. Although doubtful about their ability to provide substantially equivalent education at the secondary level, the court concluded that up through the eighth grade the parents could provide their son with the minimal education required by law. However, in at least one earlier New York case where the evidence appeared to be equally persuasive, the court concluded that the parents had not sustained their burden of proving substantial equivalence.

In a more recent New York case, *Adam D.*,[70] the court partially side-stepped the burden of proof issue by pointing to the district superintendent as responsible for determining substantial equivalency. The court reasoned that such an evaluation necessarily involves school officials because they possess the educational expertise needed to make such a judgment. Finding that the parents had been hostile, uncooperative, and guilty of educational neglect, the court ordered that the parents be placed under the supervision of the court social services agency. Should the agency wish to pursue the home schooling option, then the court cited curriculum review, teacher competency, on-site inspection, and standardized testing as permissible prerequisites for the superintendent's determination.

In a recent Michigan case, *Waddell v. State*,[71] a Seventh Day Adventist refused to send her child to school and refused to supply school officials with information demonstrating the equivalency of home instruction. Under Michigan state law, the parent has the burden of proving equivalency, but the state has the burden of determining whether a child is being educated. The parents' refusal to provide information rendered the school officials incapable of determining whether the child was receiving any education. Although the parent sought a *Yoder*-type exemption, the court held that the parents' religious freedom had not been violated by the state compulsory education law.

Where the statute is silent or ambiguous on the allocation of the burden of proof, court decisions have varied. Some courts have ruled that the burden rests on the parents to prove, as an affirmative defense, that their home instruction was equivalent to that offered in the public schools. Other courts have insisted that because of the criminal or quasi-criminal nature of the offense, the burden was on the state to prove, beyond a reasonable doubt, that the children were not receiving an equivalent education at home. A third line of cases has divided the burden between the parents and the state.

The allocation of the burden of proof was decisive in the 1981 case of *State v. Moorhead*.[72] Convicted for violating Iowa's compulsory attendance law, the parents appealed, arguing that in a criminal prosecution the state had the burden of proving, beyond a reasonable doubt, both nonattendance and the absence of equivalent instruction at home. Affirming the convictions, the Iowa Supreme Court rejected the contention that the burden rested entirely on the state to prove a lack of equivalence. Instead, the court stated, "[t]he burden of going forward with the evidence [was] on the defendant to show the applicability of a defense."[73] Because the Moorheads failed to introduce any evidence that their home instruction program was equivalent to public school instruction, the court concluded it was irrelevant that the state had also failed to introduce any evidence to the contrary, and thus the state prevailed.

Similarly, where the court has placed a burden of proof on the state and the state failed to meet its burden, the parents have prevailed. In *Sheppard v. State*,[74] an Oklahoma court held that where the burden was on the state to prove both nonattendance and lack of equivalent instruction at home, the prosecution's failure to prove the latter element was fatal for the state's case.

The divided-burden approach is illustrated by the New Jersey Supreme Court's complex ruling in *State v. Vaughn*.[75] Remanding the case for a new trial, the court divided the burden between the parent and the state. The court placed the initial burden on the state to allege a violation of New Jersey's compulsory attendance law. Having done so, the burden was shifted onto the parents to introduce evidence that their child qualified under the statutory exemptions. As the court reasoned, it was peculiarly within the knowledge of the parents to describe their at-home instruction and, therefore, it was incumbent upon them to introduce evidence that their child was receiving equivalent instruction at home. Once the parents introduced sufficient evidence to satisfy their burden of persuasion, the ultimate burden shifted back to the state.

The *Vaughn* rationale was also applied in *Massa*. Having determined the intent of the legislature required only academic equivalence, the *Massa* court concluded the only remaining question was whether the parents provided their daughter with an education equivalent to that available in the public schools. The court relied on the allocation of the burden of proof established in *Vaughn*, and found the state had not shown beyond a reasonable doubt that the parents failed to provide their daughter with an equivalent education.

In a more recent case, parents charged with violating the Alabama compulsory attendance law argued that the law was unconstitutional because it impermissibly shifted the burden of proof from the state to the parent defendants.[76] However, the court held that a statute that presumed a violation if certain elements were not met did not impermissibly shift the burden:

> It is now well established that a legislative body may provide by statute that certain facts may be prima facie or presumptive evidence of other facts . . . such statutes are within the powers of the legislative body to enact, they are not considered an infringement upon the judiciary, and are not violative of any other constitutional provisions.[77]

Category Three Cases: "Explicit" Statutes

A far smaller number of nonconstitutional cases have been decided in jurisdictions with Category Three statutes. The smaller numbers may in part be explained by the relative absence of ambiguity and adversity as to the status of home instruction.

Three primary issues have been prevalent in Category Three cases. The most commonly raised issue, the burden of proof, was also notable in Category Two cases. Another recurring issue echoes an issue from Category One cases, namely, whether home instruction constitutes a private school. A third issue, reminiscent of the Category Two question, "Who determines equivalence?," has developed where the parents have failed to comply fully with an express statutory requirement that home instruction be approved by state or local school authorities. The question here is whether the failure to follow strictly the technical requirements of the statute precludes an assessment on the merits of the home study program. Finally, a number of parents have challenged Category Three state's requirements concerning the qualifications of the home teacher.

Whether home instruction constitutes a private school has been an issue in a significant number of Category Three cases. Like the argument surrounding the same issue in Category One cases, parents have tried to seek refuge in the generally less regulated option of private schools. Unlike Category One cases, the purpose of the argument has been to avoid statutory requirements (usually teacher certification) that in some states are placed on the home instruction exemption but not placed on private schools. For the most part, the authorities have successfully counter-argued that the parents were conducting home instruction under the guise of a private school with the sole intent of evading the statutory requirements.

This issue was decisive in *T.A.F. v. Duval County,*[78] a Florida case. The appellate court affirmed the lower court judgment that the two offspring were truants and in need of supervision because they were not being educated as required by Florida law. Having the religious belief that race mixing was sinful, the parents withdrew their two children from school and instructed them at home in what they characterized as church school. The court perfunctorily dismissed any claim of a bona fide religious interest stating:

> It appears too clear to us that the educational instruction received by appellants in their home through instructions given by their mother does not comply with the provision of the statute regarding instruction at home with a private tutor who meets all prescribed requirements of law. It is equally clear that the Ida M. Craig Christian Day School attended by appellants is neither a parochial nor denominational school within the generally accepted meaning of those terms.[79]

In a subsequent Florida decision, the court reached the same result by a different route. In *State v. M.M.,*[80] the appellate court reversed a lower court judgment that had found the appellee-children were not truants. Concluding instruction at home by an uncertified teacher was not a private school, the appellate court noted home instruction and private schools were interrelated, though distinct, statutory exemptions. While home instruction has some requirements, there was a virtual absence of any statutes or administrative rules regulating non-public schools. The court reasoned the legislature would not have established two such distinct exemptions, with separate requirements, unless it intended them to be mutually exclusive; to not read the exemptions as mutually exclusive would have undermined the legislative intent.

The validity of home study as a private school was also the central issue in an unreported 1981 Colorado decision. In *Gunnison Watershed District v. Funk,*[81] the parents had removed their child from school and were instructing her at home because bus service had been discontinued to the child's remote, rural residence. The parents, neither of whom were state certified teachers, purchased a correspondence course from the Christian Liberty Academy and applied for permission to teach their daughter at home pursuant to Colorado's two-pronged home instruction provision. For a number of reasons, none of which involved the lack of certification, the state board of education denied their request. Subsequently, the Funks declared they were operating a private satellite school under the name "Funk's Christian Liberty Academy." As observed by the court, there was only one child enrolled in the program, Naomi Funk, and instruction was given by her mother in one room of their house. Much like *M.M.* the *Funk* court concluded:

> In adopting the exemptions from compulsory public school attendance, the legislature contemplated situations where education could be provided outside a public school setting—one such situation was instruction in the child's home [according to the statute] and another was instruction in an independent or parochial school [also according to statute]. Because these two categories were created as separate exemptions, it is reasonable to conclude that the legislature intended an exception for instruction in an independent school outside the home. Surely, the legislature did not comptemplate that an "independent school" would consist of a parent with a high school education and no teaching experience who attempts to provide all of the academic needs of her own child within her own home, regardless of how well motivated she might be. Such instruction cannot reasonably be considered to be an independent school, but it is plainly and simply a home instruction program.[82]
> Most recently, the District Court of Appeals of Florida, reiterated that a home school is not a private school.[83]

The allocation of burden of proof has been crucial in a number of Category Three cases, all occurring in Missouri. The most recent case, *State v. Davis*[84] followed the reasoning of two earlier Missouri decisions.[85] Charged with violating the state's compulsory school attendance law, the Davises were convicted solely on the basis of the state's evidence that their son was not regularly attending the local public school. The prosecution presented no evidence showing that the defendants had failed to provide the child with substantially equivalent instruction at home, and the defendants had not presented evidence showing their son was receiving substantially equivalent instruction at home. The defendants claimed that the burden of proof was on the state, not them. Agreeing with the defendants, the court reversed their convictions, stating:

> Since the allegation that defendants failed to provide their child with proper home instruction was an essential element of the state's case, and since the state failed to provide such element, the convictions cannot stand.[86]

Other courts have placed the burden on the parents; however, in none of these cases was burden of proof the decisive issue.

CONCLUSION

In sum, although home instruction is far less common than public or private schooling, it continues to be a hotbed for litigation and legislation. Fueled by the fires of Fundamentalism, but not limited to this strong religious motivation, home education will continue to be an active area of school law. The locus of activity has shifted from broad constitutional challenges to lobbying for legislative or administrative relief and suits for prosecution under or clarification of the resulting state statutes and regulations.

END NOTES

1. 262 U.S. 390 (1923).
2. 268 U.S. 510 (1925).
3. 273 U.S. 284 (1927).
4. 406 U.S. 205 (1972).
5. 262 U.S. at 402.
6. 268 U.S. at 534-35.
7. 406 U.S. at 214.
8. *Id.* at 235.
9. *Id.* at 224.
10. 723 S.W.2d 755 (Tex. Ct. App. 1986).
11. 29 Ohio St.3d 32, 505 N.E.2d 627 (1987), *cert. denied,* 484 U.S. 942 (1987).
12. 382 N.W.2d 631 (N.D. 1986), *cert. denied,* 107 S. Ct. 99 (1986).
13. *See, eg., Murphy v. State,* 852 F.2d 1039 (8th Cir. 1988); *Duro v. District Attorney,* 712 F.2d 96 (4th Cir. 1983); *Burrow v. State,* 282 Ark. 479, 669 S.W.2d 441 (1984).
14. State *ex rel. Naple v. Olin,* 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980); *State v. Whisner,* 47 Ohio St. 2d 181, 351 N.E.2d 750 (1978).
15. No. 5791-0114-A (Mich. Dist. Ct. Jan. 9, 1980).
16. 490 F. Supp. 109 (W.D. Mich. 1980).
17. 426 Mich. 462, 396 N.W.2d 373, 382 (1986), *cert. denied,* 107 S. Ct. 2183 (1987).
18. *State v. Shaver,* 294 N.W.2d 883 (N.D. 1980).
19. *State v. Rivinius,* 328 N.W.2d 220, (N.D. 1982), *cert. denied,* 460 U.S. 1070 (1983).
20. *State v. Toman,* 436 N.W.2d 10 (N.D. 1989); *State v. Melin,* 428 N.W.2d 227 (N.D. 1988), *cert. denied,* 109 S. Ct. 367 (1988); *State v. Anderson,* 427 N.W.2d 316 (N.D. 1988), *cert. denied,* 109 S. Ct. 491 (1988).
21. See *Pierce v. Society of the Sisters,* 268 U.S. 510, 534-35 (1925).
22. *See, e.g., Bowers v. Hardwick,* 478 U.S. 186 (1986).
23. 294 N.W.2d at 899.
24. 399 Mass. 324, 333-36, 504 N.E.2d 592, 598-600 (1987).

25. *See, e.g., Murphy v. State,* 852 F.2d 1039 (8th Cir. 1988); *Blackwelder v. Safnauer,* 689 F. Supp. 106 (N.D.N.Y. 1988); *Hanson v. Cushman,* 490 F. Supp. 109 (W.D. Mich. 1980); *Scoma v. Chicago Board of Education,* 391 F. Supp. 452 (N.D. Ill. 1974); *Blount v. Department of Education,* 551 A.2d 1377 (Me. 1988). *State v. Edgington,* 99 N.M. 715, 663 P.2d 374 (N.M. 1983); *In re Franz,* 55 A.D.2d 424, 390 N.Y.S.2d 940 (N.Y. App. Div. 1977).

26. No. 16641 (Mass. Super. Ct. Nov. 13, 1978).

27. 159 Mass. 372, 34 N.E. 402, 403 (1893).

28. *Perchemlides,* No. 16641, slip op. at 9.

29. *Id.,* at 8-9.

30. 399 Mass. at 324, 504 N.E.2d at 592.

31. 689 F. Supp. 106 (N.D.N.Y. 1988), *aff'd,* 866 F.2d 548 (2d Cir. 1989); *see also Mazanec v. North Judson-Pierre School Corp.,* 763 F.2d 845 (7th Cir. 1985); *Jernigan v. State,* 412 So.2d 1242 (Ala. Crim. App. 1982); *State v. Moorhead,* 308 N.W.2d 60 (Iowa 1980); *State v. Riddle,* 168 W. Va. 429, 285 S.E.2d 359 (1981).

32. 702 F. Supp. 516 (M.D. Pa. 1988); see also *Ellis v. O'Hara,* 612 F. Supp. 379, rev'd, 802 F.2d 462, (E.D. Mo. 1988); *State v. Newstrom,* 371 N.W.2d 575 (Minn. 1985).

33. *See, e.g., Donovan v. Dewey,* 452 U.S. 594 (1981).

34. 400 U.S. 309 (1971).

35. Klicka, *Home Schooling in the United States: An Analysis,* Home School Legal Defense Association, 1988.

36. *Id.*

37. *Id.*

38. 69 Wash. 361, 124 P. 910 (1912).

39. *Id.* , at 363-64, 124 P. at 911-12.

40. 84 N.H. 38, 146 A. 170 (N.H. 1929).

41. 191 Kan. 701, 383 P.2d 962 (1963).

42. 70 N.E. 550 (Ind. Ct. App. 1904).

43. *Id.,* at 551.

44. 404 Ill. 574, 90 N.E.2d 213 (1950).

45. *Id.,* at 577, 90 N.E.2d at 215.

46. *Id.,* at 579, 90 N.E.2d at 216.

47. 391 F. Supp. 452 (N.D. Ill. 1974).

48. People in Interest of D.B., No. 87-1360 (Colo. App. Ct., Dec. 1 1988); *Leeper v. Arlington Indep. School Dist.,* No. 17-88761-85 (Tex. Jud. Ct. Apr. 13, 1987).

49. 159 Mass 372, 34 N.E. 402 (1893).

50. *Id.*

51. 15 N.J. Misc. 80, 189 A. 131 (N.J. Super. 1937).

52. 7 N.J. Super. 608, 72 A.2d 389 (N.J. Super. 1950), *overruled,* 95 N.J. Super. 382, 231 A.2d 252 (1967).

53. 95 N.J. Super. 382, 231 A.2d 252 (N.J. Super. 1967).

54. *State v. Vaughn,* 44 N.J. 140, 207 A.2d 537 (1965).

55. 189 A. at 137.

56. 7 N.J. Super. at 614, 72 A.2d at 392.

57. 231 A.2d at 255.

58. *In re Falk,* 110 Misc.2d 104, 441 N.Y.S.2d 785 (N.Y. Fam. Ct. 1981); *In re Franz,* 55

A.D.2d 424, 390 N.Y.S.2d 940 (N.Y. App. Div. 1977); *In re Thomas H.*, 78 Misc.2d 412, 357 N.Y.S.2d 384 (N.Y. Fam. Ct. 1974); In re Foster, 69 Misc.2d 400, 330 N.Y.S.2d 8 (N.Y. Fam. Ct. 1972); *People v. Turner,* 277 A.D. 317, 98 N.Y.S.2d 886 (N.Y. App. Div. 1950).

59. 308 N.W.2d 60 (Iowa 1981).

60. *Id.* at 64.

61. 78 Misc.2d 412, 357 N.Y.S.2d 384 (N.Y. Fam. Ct. 1974).

62. *See* No. 16641 (Mass. Super. Ct. Nov. 13, 1978).

63. An obvious exception is if the court finds the equivalence language to be unconstitutionally vague.

64. *State v. LaBarge,* 134 Vt. 357 (1976); *Commonwealth v. Renfrew,* 332 Mass. 492, 126 N.E.2d 109 (1955); *Commonwealth v. Kollack,* 27 Pa. D. & C. 81 (C.P. 1936).

65. 332 Mass. at 492, 126 N.E.2d at 109.

66. *Id.* at 494, 126 N.E.2d at 111.

67. *In re Falk,* 110 Misc.2d 104, 441 N.Y.S.2d 785 (N.Y. Fam. Ct. 1981); *In re Thomas,* 78 Misc.2d 412, 357 N.Y.S.2D 384 (N.Y. Fam. Ct. 1974); *In re Meyers,* 203 Misc. 549, 119 N.Y.S.2d 98 (N.Y. Fam. Ct. 1953).

68. *In re Falk,* 110 Misc.2d at 104, 441 N.Y.S.2d at 785.

69. 441 N.Y.S.2d at 789.

70. 132 Misc. 2d 797, 505 N.Y.S.2d 809 (N.Y. Fam. Ct. 1986).

71. No. 84-70 ARW (Cir. Ct. Cnty. Berrien, Mich. 1987), *app. dismissed,* 483 U.S. 1002 (1987).

72. 308 N.W.2d 60 (Iowa 1981).

73. *Id.* at 63.

74. 306 P.2d 346 (Okla. Crim. App. 1957).

75. 44 N.J. 142, 207 A.2d 537 (1965).

76. Hill v. State, 410 So.2d 431 (Ala. 1981).

77. *Id.* at 443.

78. 273 So.2d 15 (Fla. Dist. Ct. App. 1973).

79. *Id.* at 19.

80. 407 So.2d 987 (Fla. Dist. Ct. App. 1981).

81. No. 81-JV-3 (Colo. Dist. Ct. Dec. 30, 1981).

82. *Id.*, slip op. at 3-4.

83. *State v. Buckner,* 472 So.2d 1228 (Fla. Dist. Ct. App. 1985).

84. 598 S.W.2d 189 (Mo. Ct. App. 1981).

85. *Id.*; *State v. Pilkinton,* 310 S.W.2d 304 (Mo. Ct. App. 1958); *State v. Cheney,* 305 S.W.2d 892 (Mo. Ct. App. 1975).

86. 598 S.W.2d at 191.

Accommodation of Employees' Religious Observances

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School boards must reconcile employees' religious observances with the school's need for efficient operations. Typically, the conflict arises when a teacher's religion requires a number of absences for observance of holy days. In such instances, the prohibition in Title VII of the Civil Rights Act of 1964 against religious discrimination requires public schools to make reasonable accommodation for the employee's religious practices or, in the alternative, to show that reasonable accommodation would cause the school district undue hardship.

Specifically, Title VII makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion,* sex, or national origin ...."[1] Under this provision, "religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religious observance or practice without *undue hardship* on the conduct of the employer's business."[2] If a court finds that an employer has intentionally violated, or continues to intentionally violate, this anti-discrimination provision, Title VII further provides that "the court may enjoin the respondent [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay ... or any other equitable relief as the court deems appropriate."[3]

WHAT IS "REASONABLE ACCOMMODATION" ?

Use of Paid/Unpaid Leave

To avoid costly and involved litigation, public schools must determine what constitutes a "reasonable accommodation" of religious practices. The U.S. Supreme Court expressed qualified approval of the use of unpaid leave as a reasonable accommodation in *Ansonia v. Philbrook.*[4]

The school's policy in *Ansonia* provided three days of paid leave for religious observances and three days of paid leave for personal business. The policy also explicitly prohibited teachers from using any of the three days of personal leave for religious observances. Thus, employees were required to take unpaid leave for any holy day observances after they exhausted the three days of paid religious observance leave.

The Court stated that such a policy "would generally be a reasonable one."[5] However, the Court also noted that unpaid leave is *not* a reasonable accommodation "when paid leave is provided for all purposes *except* religious ones."[6] To the Court, "[s]uch an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness."[7]

The U.S. Court of Appeals for the Tenth Circuit also has approved the use of unpaid leave to accommodate employees' religious observances. In *Pinsker v. Joint Dist. No. 28J of Adams and Arapahoe,*[8] the school district's policy provided two days of paid "special leave," and required teachers who needed more than two days for

74

religious observances to take unpaid leave for the excess days. The court held that unpaid leave is a reasonable accommodation because Title VII "does not require employers to accommodate religious practices of an employee in exactly the way the employee would like to be accommodated."[9] Further, the court noted that Title VII does not require accommodation "in a way that spares the employee any cost whatsoever."[10]

Based upon these cases, courts are likely to uphold the use of unpaid leave to accommodate employees' religious practices. However, schools should be cautioned against using paid leave for every type of absence *except* religious ones. Such an arrangement is likely to be considered religious discrimination, and therefore, probably would be struck down by a court.

EEOC Regulations Governing Accommodation

In addition to unpaid leave, the Equal Employment Opportunity Commission ("EEOC") has promulgated regulations specifying additional accommodations considered to be reasonable. Although such regulations do not have the force of law, courts often look to them for guidance in deciding cases. The "reasonable accommodations" favored by the EEOC include:

- securing a substitute or arranging for an employee to "swap" shifts with a similarly qualified worker;
- using flexible scheduling which allows employees to choose the days they work; and
- allowing lateral transfers or changes of job assignments.[11]

Accommodation in the Private Sector

Courts also have found other means of accommodation to be reasonable in private sector situations, and it is possible that they would apply them in a school context, too. For example, an employer may keep an employee on layoff until a satisfactory shift can be found. In the case of *Bennett v. Monon Trailer Corp.*, an employee who was a member of the Worldwide Church of God sued her former employer under Title VII after she was terminated for excessive absences.[12]

Prior to her termination, the plaintiff had been placed on a layoff status with a number of other employees. When the company recalled the workers, the job open for the plaintiff necessitated working until 11:00 p.m. on Fridays. Because the plaintiff's religion required her to refrain from work from sundown Friday until sundown Saturday, the company offered to allow her to remain on layoff until a dayshift, which would not conflict with her religious observances, became available. The plaintiff refused that attempt at accommodation, and instead accepted the position which required her to be absent every Friday for in excess of five hours.

The court upheld the company's decision to terminate the plaintiff for these accumulated absences. It reasoned that the company had not discriminated against plaintiff on the basis of her religion. Rather, by essentially offering the plaintiff a leave of absence so that she could wait for a dayshift position, the company had made "a reasonable attempt at accommodation."[13]

Another approved means of accommodation is to offer an employee a position which, although may be a change in status, would carry the same salary as the job with a religious conflict. For example, in *Mathewson v. Florida Game & Fresh Water Fish Commission*,[14] the court held an employer's offer to change an employee from a field job to a desk job to be a reasonable accommodation. The court reached this conclusion despite the fact that the proposed change involved a reduction in rank.

Options like these may be of special interest to schools in dealing with non-teaching personnel whose shifts and job responsibilities are more flexible. Further, schools might consider allowing personnel who must miss work for religious purposes to make up the missing time. For example, a teacher might be allowed to make up time by working during vacation periods or performing extra duties after classes. Such an accommodation has not been approved by the courts, but it appears to be reasonable in light of other accepted means of accommodation.

There is one accommodation option, however, that has been struck down by the courts as unreasonable. In *Smith v. Pyro Mining Co.*,[15] the court held that an employer's attempt to accommodate an employee's religion by requiring him to seek his own replacement was not reasonable where the employee sincerely believed that it was a sin to try to induce another to work on his

Sabbath. Instead, the court held, the employer should have solicited the employee's replacement in order to accommodate his religious beliefs. It appears that although the "reasonable" standard is broad, it probably will not include a means of accommodation that requires an employee to violate his religious beliefs.

WHAT IS "UNDUE HARDSHIP" ?

Once a school has offered a reasonable accommodation to a religious employee, its obligation under the law is fulfilled. "The employer need not further show that each of the employee's alternative accommodations would result in undue hardships."[16] However, if a school does not offer an employee a reasonable accommodation, it must show that it is unable to do so without undue hardship on the conduct of its operations.

The courts have established guidelines for determining what constitutes an "undue hardship." In 1977, the U.S. Supreme Court held that requiring an employer to bear more than a *de minimis* cost constitutes undue hardship.[17] In *Trans World Airlines v. Hardison*, the plaintiff was transferred to a different plant, and as a result, had insufficient seniority under the collective bargaining agreement to be off each Sabbath and holy day. The Supreme Court refused to require the employer to take steps inconsistent with its collective bargaining agreement in order to accommodate the employee's religious practices.

In examining this situation, the Court specifically identified three types of arrangements which result in undue hardship. These are:

- forcing an employer to permit an employee to work a four day week and utilize a supervisor or another worker to fill in for the absent employee on the fifth day;
- requiring an employer to replace an employee through the payment of premium (overtime) wages; and
- requiring an employer to work out a shift or job swap for an employee where such an arrangement would violate an existing collective bargaining agreement.[18]

Accordingly, schools should not be required to accommodate their employees by any of these means.

Given the five day school week and the availability of substitutes, neither of the first two hardships proscribed by *Hardison* is likely to arise in a teacher's situation. Rather, the issue which is more likely to be encountered is whether occasionally having to hire a substitute teacher constitutes undue hardship upon a school. The cases to date suggest that, in general, occasionally being forced to hire a substitute in order to accommodate a teacher's religious practices is not an undue hardship.

Occasional use of substitutes has been required even where there is evidence that instruction by a regular teacher is preferable to instruction by a substitute. In *Niederhuber v. Camden County Vocational & Technical School Dist. Board of Education*[19] the school board contended that allowing a teacher's religious absences "would be detrimental to the students, particularly handicapped students, by depriving them of a stable and structured learning environment."[20] The court, however, held that "[w]hile the court can speculate that instruction by a regular teacher is preferable to instruction by a substitute, we are unable to find that plaintiff's absence for five to ten days a year is sufficiently detrimental to warrant disqualifying him from employment as a teacher."[21] The court also found hiring a substitute to be a *de minimis* cost because:

- it would be required only five to ten times per year;
- finding a replacement at a comparable rate of pay would not be difficult;
- it would not add to the school's costs since religious employees can be required to take leave without pay; and
- excusal of the absences and replacement by substitutes would not force the school board to violate any seniority agreements.[22]

Likewise, the California Supreme Court held that employing a substitute would not result in undue hardship for a school.[23] There, a district superintendent testified that "a substitute cannot equal a good regular teacher because the substitute takes time to become acquainted with the pupils' abilities and discipline problems, and may not be able to execute the lesson plan properly or acquire enough information to provide continuity of instruction."[24] Nevertheless, the court found that such evidence failed to show that the teacher's absence for five to ten holy days a year "imposed a hardship sufficiently severe to warrant disqualifying him from employment as a teacher."[25]

Even having to use a substitute who is untrained in the discipline being taught has not been held as undue hardship.[26] In *Wangsness v. Watertown School District*, the school district contended that an industrial arts teacher's absence for a seven day religious festival would cause the district undue hardship because there was no qualified teacher to serve as a substitute. The court, however, found that the teacher's absence would "not affect the efficient operation of the school."[27] Accordingly, it rejected the district's undue hardship argument and concluded that the teacher had been unlawfully discharged.

Despite the court's apparent reluctance to find that accommodating an employee's religious commitments causes undue hardship, it is important to note that the courts deciding these cases have not laid down any hard and fast rules for schools to follow. Instead, they have based their decisions on the specific ameliorating factors existing in each case. First, in each of the cases, the number of absences involved was only between five and ten per year. Second, no evidence showed that the absences would be detrimental to either the students or the efficiency of the school. Third, in both *Wangsness* and *Rankins*, the teacher with religious obligations left detailed lesson plans for the substitute. Fourth, the *Rankins* court considered it important that teachers in nearby school districts were permitted the same number of absences for religious observances (e.g., the *Rankins* court relied upon comparable practices to analyze undue hardship).

By implication, a court might find hiring a substitute to be an undue hardship where some or all of these ameliorating factors do not exist. For example, a court might find undue hardship upon a school if the number of absences required by a teacher exceeds ten. Likewise, if a teacher already has a poor attendance record apart from religious absences, a court could be influenced by that factor and more readily find undue hardship for the school. Further, evidence that students will be harmed by the teacher's excessive absences (e.g., in the case of special education students needing trained supervision) might cause a court to find the hardship of hiring a substitute to be too severe for the school. Finally, where a school would have to go to great lengths to find or prepare a substitute, or suffer some other inefficiency, a court also might find undue hardship. Thus, while the standard is far from settled, it is reasonable to assume that in order to prove undue hardship from accommodating a teacher's religious beliefs, a school must be able to pinpoint a specific detriment to it or its students that is caused by the accommodation.

CONCLUSION

As the above discussion indicates, case law continues to define both "reasonable accommodation" and "undue hardship" in the employment context. For now, however, the cases and regulations must serve as guides for public schools in determining what the law requires them to do in order to fulfill their obligations under Title VII.

The courts have agreed that a school fulfills its Title VII obligations by providing employees with unpaid leave and hiring substitutes on the days of religious observances. The first two to three of such absences typically are accommodated through some type of paid leave (e.g., personal leave days—but such an arrangement has not yet been required by the courts). Further, EEOC regulations and private sector cases indicate that accommodations such as flexible scheduling, keeping an employee on layoff, allowing shift trading, and changing job assignments also are reasonable under the law.

At some point, however, accommodating an employee's religion may cause a school undue hardship. While the courts have not yet determined exactly where that point may be, a school that can point to specific detriment caused to it or its students by the accommodation is likely to establish the fact that it has encountered undue hardship. In such cases, the school's need for efficient operations will prevail over the employee's religious needs.

END NOTES

1. 42 U.S.C. § 2000e-2(a)(1) (1981) (emphasis added).

2. 42 U.S.C. § 2000e(j) (emphasis added).

3. 42 U.S.C. § 2000e-5(2)(g). An employer also may be required to pay unemployment compensation benefits for refusing to accommodate a current or prospective employee's religious beliefs. In four cases which plaintiffs have refused work because of their religious beliefs, the U.S. Supreme Court has held that denial of unemployment compensation benefits would violate the free exercise clause of the first amendment of the U.S. Constitution, as applied to the states through the fourteenth amendment. Thus, even where state law on unemployment compensation eligibility required individuals "either to apply for available, suitable work when so directed . . . or to accept suitable work when offered," the Court required payment of such benefits for employees who refused jobs because the jobs required them to work on Sunday. *Frazee v. Illinois Dept. of Employment* Sec., 109 S. Ct. 1514 (1989). *Accord Hobbie v. Unemployment Compensation Appeals Comm'n of Florida,* 480 U.S. 136 (1987), *Thomas v. Review Bd. of Indiana Employment Sec. Division,* 450 U.S. 707 (1981), and *Sherbert v. Verner,* 374 U.S. 198 (1963).

4. 479 U.S. 60 (1986).

5. *Id.* at 70.

6. *Id.* at 71.

7. *Id.*

8. 735 F.2d 388 (10th Cir. 1984).

9. *Id.* at 390.

10. *Id.* at 391. *See also King v. Iowa Civil Rights Comm'n,* 334 N.W.2d 598 (Iowa 1983).

11. 29 C.F.R. § 1605.2(d)(1) (1987). An employer is not expected to make this kind of accommodation, if doing so would violate an otherwise valid collective bargaining agreement. *Trans World Airlines v. Hardison,* 432 U.S. 63, 79 (1977).

12. 631 F. Supp. 724 (N.D. Ind. 1985).

13. *Id.* at 729.

14. 693 F. Supp. 1044 (M.D. Fla. 1988).

15. 827 F.2d 1081 (6th Cir. 1987).

16. *Ansonia v. Philbrook,* 479 U.S. 60, 68 (1986).

17. *Trans World Airlines v. Hardison,* 432 U.S. 63, 65 (1977)

18. *Id.* at 84.

19. 495 F. Supp. 273 (D. N.J. 1980).

20. *Id.* at 280.

21. *Id.*

22. *Id.* at 279.

23. *Rankins v. Commission on Professional Competence of the Ducor Union School Dist.,* 24 Cal.3d 167, 154 Cal. Rptr. 907, 593 P.2d 852 (1979).

24. 593 F.2d 854.

25. *Id.* at 857.

26. *Wangsness v. Watertown School Dist.,* 541 F. Supp. 332 (D.S.D. 1982).

27. *Id.* at 338.

Policies and Practices on Religious Expression in the Schools

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Prayer, activities which involve religious expression, and displays which include religious symbolism are all areas which create the potential for controversy in the public school setting. Guided by emotion, and attempting to appease the apparent majority, political candidates clamor for a return of prayer to the classroom. School board members, responsible for developing policies which govern religious practices in the schools, must be sensitive to their constituencies, but also must have a clear understanding of the constitutional principles which limit the extent of their authority when acting in this volatile area.

An understanding of the legal problems presented by religious expression in the public schools requires an examination of two clauses of the first amendment to the United States Constitution: the free exercise clause and the establishment clause.[1] Although the words of the first amendment speak to congressional action, the religion clauses of the first amendment apply to state action through the fourteenth amendment.[2]

Under the free exercise clause, the freedom to believe is absolute, but the freedom to act on those beliefs can be overridden by other governmental interests, including concerns under the establishment clause.[3] The establishment clause prohibits government from "establishing religion." In order to withstand constitutional scrutiny, governmental action must have a secular purpose, must not have a primary effect of advancing or inhibiting religion, and must not cause excessive entanglement between religion and government.[4] Action which is perceived, under all the surrounding circumstances, as endorsing or disapproving of religion will not be upheld by the courts, even if the infringement can be characterized as minimal.[5]

Clearly, tension exists between the free exercise and establishment clauses, but both constitutional guarantees are based on the principles of separation of church and state, and state neutrality in matters concerning religion. The principles of separation and neutrality guarantee the individual right to liberty of conscience, to keep the state from interfering in religious life, to prevent the trivialization of religion which can occur with attachment to organs of government and guarantee that essentially religious issues cannot become the occasion for battle in the political arena.[6]

While the Constitution attempts to create a wall of separation between church and state, in interpreting those clauses, the courts have stressed that the clauses demand state neutrality, not hostility, toward religion.

Challenges to legislative action or school board policies alleging a violation of the establishment clause have occurred in numerous areas. Prayer in school, prayer at student activities, moment of silence laws, and the presence of religious symbols in school buildings have all resulted in court challenges. While court opinions do not provide definitive answers for all variations in circumstances, they do provide school boards with guidelines for determining what actions are clearly unacceptable, and support for making a decision which may be unpopular.

RELIGIOUS EXERCISES IN THE CLASSROOM

Prayer or the reading of Bible verses in school is not a new phenomena. At the time of the drafting of the Constitution, public schools were virtually nonexistent. Prayer and Bible study were an inherent part of sectarian sponsored education. Even after the rise of public education, state statutes mandating daily devotional exercises were relatively few in number.7

In the early 1960's the United States Supreme Court addressed the issue of the constitutionality of daily devotional exercises in two separate cases, *Engel v. Vitale*[8] and *Abington School District v. Schempp*[9] At issue in *Engel* was a school board policy adopted in accordance with the recommendation of the State Board of Regents, which required teachers to lead students in the daily recitation of an officially composed prayer. The prayer was short, only twenty-two words long, and nondenominational. Students not wishing to participate in the exercise could remain silent or be excused from the room.

In holding that the practice violated the establishment clause, Justice Black, writing for a majority of the court, stated, "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[10]

A year later in *Abington*, the Court considered statutes in Pennsylvania and Maryland which required the reading of verses from the Bible, without comment, and the recitation of the Lord's Prayer at the opening of each school day. Although students could absent themselves from the classroom if they did not wish to participate, the activity was part of the regular curricular program, and under the supervision of a classroom teacher.[11]

In striking down the laws as unconstitutional, the Supreme Court concluded that although the secular purposes of "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature"[12] were advanced, the exercises were essentially religious in nature. That the exercises were part of the regular curricular activity of students who were required by law to attend school and held in school buildings under the direct supervision of school employees weighed heavily in finding a violation of the establishment clause.

Two arguments frequently put forth in prayer cases were flatly rejected by the Supreme Court in *Schempp*. First, the fact that a student could absent himself from the exercise did not, in the eyes of the court, alleviate the establishment problem.[13] Second, even if the exercise could be characterized as a minor encroachment, taking only a short period of each day, the court concluded any encroachment is constitutionally impermissible.[14]

Since *Schempp*, the Supreme Court has not directly addressed the issue of prayer in school, except in the context of moment of silence laws.[15] *Engel* and *Schempp*, however, did not address the issues of individual prayer, or prayer at school activities outside the controlled classroom. Several lower court decisions have dealt with variations on the theme, and further delineated the circumstances in which devotional exercises constitute establishment.

The laws and policies challenged in *Engel* and *Schempp* required school personnel to supervise mandatory devotional exercises. In *Karen B. v. Treen*,[16] the Louisiana statute in question provided that school boards could authorize appropriate school personnel to permit student or teacher prayer in the classroom. The school board policy adopted under the law authorized teachers to inquire whether any student wished to offer a prayer, and permitted the teacher to pray in the absence of a student volunteer. No student or teacher was required to participate, and any student who wished to participate had to request to join in the exercise and submit written permission from his parents. School guidelines limited the activity to one minute of prayer followed by one minute of silence.

Noting that prayer is the "quintessential religious practice," the court concluded that even if accompanied by arguably secular purposes of increasing religious tolerance, developing self-esteem, and enhancing awareness of the spiritual aspects of human nature, the means to accomplish those ends, were an intrinsically religious practice.[17] That students could be excused from the exercise, and in fact had to affirmatively request to participate, only accentuated the religious nature of the activity. Further, school personnel, while not required to participate, were required to monitor the activity to ensure that participation was voluntary and to enforce the time limitations.

In addition to challenges alleging establishment of religion through the use of devotional exercises in the classroom, efforts by state agencies and school boards to stop such practices have resulted in challenges to such policies on free exercise grounds. Parents have also alleged that prohibiting these practices infringes on their liberty interests under the fourteenth amendment.[18] To date court decisions in this area have concluded that the school's interest in protecting against the establishment of religion overcomes the free exercise and liberty interest arguments.[19]

From these cases, certain principles arise which will serve to assist school boards in developing policies in this area which will pass constitutional muster. First, prayer in school should not be part of a regular, curricular exercise. If permissible in the school context, prayer should not be officially sponsored or sanctioned by the school district.[20] Second, nondenominational prayer, or even verses of thanksgiving which delete references to a deity do not eliminate the constitutional infirmities.[21] Because prayer is viewed by the courts as the quintessential religious expression, where the purpose of any recitation or reading is to advance or endorse religion, the establishment clause will be violated. Third, prayer in the classroom, in the presence of a teacher who is viewed as an authority figure in the eyes of the young, impressionable students who are required to be in attendance cannot withstand constitutional challenge.[22] Fourth, student-initiated prayer fares no better than prayer which is directed by a teacher, at least where the prayer occurs in a classroom setting, or in a setting where school approval of the activity can be implied.[23]

School boards hoping to avoid controversy by failing to adopt policies in this sensitive area should be aware of the potential pitfalls. Practices in the district may be interpreted by the courts as the policy of the district where the board has knowledge of religious activity in the school district and allows the practices to continue. In such cases, the board may be deemed in violation of the establishment clause, even though it has taken no direct action on the matter.[24]

While free exercise rights do not give teachers, students or staff the right to proselytize their views to others within the school system, court decisions to date clearly indicate that a student does not shed free exercise rights when entering the school. No court case has ever suggested that a student cannot engage in silent prayer, or cannot read religious materials during the school day, and in fact several cases have suggested that allowing for a moment of silence for prayer or meditation may be entirely permissible if such a policy is not motivated by religious purposes. The next section of this chapter will discuss moment of silence policies in detail.

MOMENT OF SILENCE

At the time of the Supreme Court decision in *Wallace v. Jaffree*,[25] the first Supreme Court case addressing the constitutionality of a moment of silence law, twenty-five states had laws which either permitted or allowed for a moment of silence in the states' public schools.[26] Generally the statutes provided for a brief period during the school day to be used for meditation, prayer, contemplation, or introspection.[27] Many of the statutes specifically provided that the moment of silence was "not intended as a religious exercise but was to be considered as an opportunity for silent prayer of meditation on a religious theme or a moment of silent reflection on the anticipated activities of the day."[28] Some of the state statutes required school boards to adopt policies in compliance with the statue, others left the decision to the board's discretion. Some of the statutes required both teachers and students to observe the moment of silence, in others the moment of silence was required only of students, or students in particular grades. Finally some of the statutes required student participation, others made the observance voluntary.

The concurring opinion of Justice Brennan in *Abington* first suggested that a moment of silence in the schools could be a constitutionally permissible practice.[29] Several legal scholars have similarly concluded that a moment of silence is not on its face a religious observance which would give rise to a constitutional question[30] Justice O'Connor has even gone so far as to suggest that the use of the word "prayer" in a moment of silence statute does not necessarily predict its downfall on constitutional grounds.[31]

However, a reading of the case law surrounding moment of silence laws leads to the conclusion that if the purpose of the enactment is to return prayer to the classroom, the statute will be struck down as violating the establishment clause.[32]

Two cases which illustrate the difficulty in predicting the constitutionality of state statutes in this area come from the states of Massachusetts and New Mexico. In *Gaines v. Anderson*[33] the Massachusetts statute in question provided:

> At the commencement of the first class of each day in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in.[34]

The challenged statute in New Mexico provided that:

> Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken.[35]

In upholding the statute and school guidelines for its implementation, the Massachusetts court looked to the statutory language, its legislative history, and the application in the school setting. When the act was first enacted in 1966 it originally provided only for a period of silence for "meditation." During the legislative process the word "prayer" was deleted and replaced with the word "meditation." When the statute was amended in 1973, the original amendment proposed using "meditation and prayer." Ultimately "and" was replaced by "or" in the wording.[36]

The court found the wording changes significant and indicative of the legislative intent to maintain neutrality toward religion. The court further concluded that the school's guidelines for implementation of the moment of silence, required teachers only to command the student to be silent for one minute. The teacher did not command students to either meditate or pray. Comparing the situation to *Schempp*, the court noted that the statute here did not compel participation in a religious exercise, or require a student to request to be excused. Finding a lack infringement on a student's free exercise rights, the court concluded the practice did not coerce on the part of the school district or jeopardize liberty interests of parents in directing the religious upbringing of their children.

Looking to the purpose of the New Mexico statute in question in *Duffy v. Los Cruces Public Schools*,[37] the court concluded that inclusion of the word "prayer" in the statutory language, along with a memorandum from the drafter of the legislation which indicated his intent for "a bill which would authorize some form of prayer in our public schools,"[38] were indicative of the religious purpose of the legislation. The court further concluded that the words "meditation" and "contemplation" were not indicative of "neutrality," but merely an effort to disguise the religious nature of the legislation.

Next the court turned to the school board's action in adopting a policy in accordance with the legislation. Evidence revealed that school board discussions focused only on the religious aspects of the legislation. The court found that the alleged secular benefits of enhancing discipline and instilling the intellectual composure necessary for effective learning were "afterthought justifications,"[39] and pretextual in nature.

Concluding that the marginal educational benefits were outweighed by the danger that children would perceive the moment of silence as governmental approval of religion, the court held the statute unconstitutional.

The U.S. Supreme Court first addressed the issue of the constitutionality of the Alabama moment of silence law in *Wallace v. Jaffree*.[40] At the beginning of the litigation in *Wallace*, three statutes were in question. The first, enacted in 1978, required all schools to observe a one minute period of silence "for meditation" in grades 1 through 6.[41] The second, enacted in 1981, required schools to allow teachers in all grades to observe a one minute period of silence for "meditation or voluntary prayer."[42] The third, enacted in 1982, authorized teachers to pray or lead willing students in a prescribed prayer.[43] The lower courts found the 1978 law which prescribed only "meditation" did not create an establishment clause problem, and that holding was not appealed.[44]

In 1985, the Supreme Court affirmed the appellate court's decision finding the 1982 law clearly unconstitutional.[45] The 1985 Supreme

Court opinion in *Wallace* dealt only with the 1981 enactment which authorized a moment of silence for "mediation or voluntary prayer."

In *Wallace* the Court, in applying the purpose prong of the three-part *Lemon* test, adopted the endorsement test first advocated by Justice O'Connor in *Lynch v. Donnelly*, which asks, "whether government's actual purpose is to endorse or disapprove of religion."[46] In this case, the legislative history of the bill, and the testimony of the sponsor of the bill indicated its sole purpose was an effort to return voluntary prayer to the schools. Further, because the 1978 law did not forbid prayer during the moment of silence, the court found no secular purpose in the 1981 law which was not already served by the 1978 law. The court concluded, "The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."[47] Significantly, the court did not suggest that all moment of silence laws are necessarily unconstitutional.

Although the issue of the constitutionality of a New Jersey moment of silence law reached the Supreme Court, the case, *Karcher v. May*, was dismissed on jurisdictional grounds.[48] The Supreme Court therefore did not reach the establishment clause issue, allowing the lower court decision which found the statute unconstitutional to stand. The New Jersey statute in question provided:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.[49]

The district court looking to the testimony of three witnesses present at the legislative hearings, newspaper accounts of the hearings, evidence of the perceptions of various citizens and citizens groups about the purpose, expert testimony about the pedagogical value of the moment of silence, and prior bills introduced on the same issue concluded that the purpose of the statute was entirely religious. Concluding the trial court's findings were not clearly erroneous, the Third Circuit Court of Appeals affirmed the trial court's determination that the statute was unconstitutional.

In cases involving moment of silence policies, the primary question in determining constitutionality will generally be whether the actual purpose of the school board in enacting the policy was to endorse or disapprove of religion. However, determining the purpose behind a law or a policy is not always an easy question to answer.

The words of the policy itself will be important in determining the policy's constitutionality. Inclusion of the word "prayer" may suggest a religious purpose, but it also may suggest a type of religious accommodation which is entirely permissible. In the cases previously discussed, the Massachusetts statute which included a reference to prayer was upheld, while the New Jersey statute which included no reference to any religious practice was struck down.

In all of the cases discussed, beyond the language of the statute, the courts looked to the legislative history of the act. Board minutes when policies are enacted may provide similar keys to the reason a particular policy was adopted. Statements which indicate that the policy is an attempt to return prayer to school, or to favor prayer over other activity during the moment will most probably render the policy unconstitutional. Educational reasons for the moment of silence must form the basis for the enactment of the policy, and should be clearly delineated in the policy itself, or in the minutes of the board.

Efforts should be made to ensure that the intent of the board in enacting the policy is clearly understood. Without such evidence it is likely that courts will listen to the testimony of individual board members on their individual intent in proposing or voting on the policy, even though judges have recognized that the intent of an individual does not necessarily correctly reflect the intent of the body as a whole.

Board policies in this area should strive to ensure that teachers who will supervise the moment of silence do not encourage prayer during the period. Even if the policy is constitutional on its face, the policy could be struck down as applied if in practice it is used to encourage religious activity.[50]

PRAYER AT EXTRACURRICULAR ACTIVITIES OR CEREMONIAL FUNCTIONS

The issue of prayer or religious expression at extracurricular activities raises two distinctly different questions. The first concerns the use of school facilities for student activities which are religious in nature, and is the subject of another chapter of this book. The second concerns the use of prayer or other religious expression at school sponsored events.

In *Doe v. Aldine Independent School Dist.*,[51] an anonymous plaintiff brought suit against the school district alleging that the recitation and singing of a school prayer at athletic contests, pep rallies and graduation ceremonies violated the first amendment.[52] All of the events at which the prayer was recited or sung were school-sponsored and part of the school's regular extracurricular program. In practice the singing was frequently initiated by the principal or other school employees. Attendance at any of the events was voluntary, as was participation in the singing or recitation of the verse.

The school district asserted that the school prayer had a clear secular purpose of instilling a sense of school spirit and pride in the students which had a beneficial effect on the student body and contributed to an increase in morale and a decrease in disciplinary problems. While agreeing that the school prayer did serve these secular purposes, the court noted that the same effect could be achieved through entirely nonreligious means, and concluded that the practice violated the purpose prong of the *Lemon* test. The fact that religious means may further nonreligious goals does not alleviate the constitutional problem.

Further, the court concluded that the practice carried with it the implied recognition and approval of religious activity which had the effect of advancing religion. Finally, the court concluded that because school employees supervised the activities, and because the activities occurred on district property, entanglement concerns were raised as well.

In a case which has caused considerable controversy, the Eleventh Circuit Court of Appeals held the practice of opening football games with an invocation unconstitutional in *Jager v. Douglas County School District.*[53] The Supreme Court denied review in the case.

Invocations at football games had been a part of the Douglas County School tradition since at least 1947. While the method of selecting the invocation speaker varied throughout the years, at the time Doug Jager, a Native American student, complained about the practice, the speaker was being selected by a local minister. In response to Jager's objections, the school district suggested that inspirational secular speeches might be an alternative, but ultimately adopted an equal access plan for the invocation speaker. Under the plan, all school clubs and organizations could designate club members to give invocations. Additionally any student, parent or staff member could volunteer to offer the invocation. Student government was placed in charge of randomly selecting the speakers, and the plan provided for no monitoring of the content of the invocation.

Unsatisfied with the plan, the Jagers filed suit in the federal district court. The court for the Northern District of Georgia issued a temporary restraining order enjoining the invocations, and after a trial concluded that the pregame invocations were unconstitutional. In a later opinion, the court concluded, however, that the equal access plan was unconstitutional on its face.

The Eleventh Circuit agreed that the pregame invocations were unconstitutional, but also found the equal access plan unconstitutional.

In defending the equal access plan, the school district argued that the Supreme Court's analysis in *Marsh v. Chambers*,[54] a case upholding the practice of opening legislative sessions with prayer, rather than the *Lemon* test, should apply. The High Court's decision in *Marsh* was predicated on the "unique history" associated with the practice of opening legislative sessions with a prayer. Because prayer opened congressional sessions both before and after the adoption of the first amendment, the Court concluded that the framers of the Constitution could not have intended that such prayer be impermissible under the establishment clause. *Marsh* is the only establishment clause case in which the court has not applied the *Lemon* test since its adoption in 1971.

The Eleventh Circuit concluded that the *Marsh* decision was limited in application, and should not be applied in the context of the public school system where the Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause."[55] The court also noted that in *Edwards v. Aguillard*,[56] the Supreme Court concluded that the historical approach relied upon in *Marsh* was "not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted."[57]

Applying the *Lemon* test to the equal access plan, the court first looked to the purposes of the pregame invocation. The district court found those purposes to be: "(1) to continue a long-standing custom and tradition, (2) to add a solemn and dignified tone to the proceedings, (3) to remind the spectators and players of the importance of sportsmanship and fair play, and (4) 'to satisfy the genuine, good faith wishes on the part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity.'"[58] Finding the school district could serve all of the secular purposes "by requiring wholly secular inspirational speeches about sportsmanship, fair play, safety, and the values of teamwork and competition," the court concluded that the plan "was adopted with the actual purpose of endorsing and perpetuating religion."[59]

School practices with regard to invocations and benedictions at ceremonial events such as graduations have also been the subject of several court decisions.

Early cases addressing the issue of prayer at graduation ceremonies concluded the practice did not constitute an establishment of religion. Characterizing graduation ceremonies as "a ceremony geared primarily toward the award of honors and diplomas,"[60] the Virginia federal district court in *Grossberg v. Deusebio*[61] concluded the invocation and benedictions in question did not violate the constitution. Similarly, the federal district court in Pennsylvania concluded that such prayers, even if they incidentally benefited religion, did not transform the "primarily secular" graduation service into an impermissible establishment of religion.[62] The Pennsylvania Supreme Court, in a case raised against the same school district a few years later concluded that the practice did "not promote the type of interdependence between church and religion which the First Amendment was designed to prevent."[63]

More recently court decisions addressing this issue have reached the opposite conclusion. In *Graham v. Central Community School District of Decatur,*[64] the court held that the inclusion of a religious invocation and benediction at graduation ceremonies violated the establishment clause. When the father of a graduating senior appeared before the board of education to voice his objections to the religious content of the proposed graduation ceremonies in 1984, the board agreed to allow the Community Ministerial Alliance to conduct a baccalaureate ceremony on its own, but refused to change the practice of having a minister offer an invocation and benediction at the graduation ceremonies themselves.

Applying the *Lemon* test to the facts of the case, the court concluded that the invocation and benediction served "a Christian religious purpose, not a secular purpose."[65] The court noted that the conclusion was supported not only by testimony in the record indicating the religious purpose, but also "by the undeniable truth that prayer is inherently religious."[66]

In this case, over 700 persons had signed a petition urging the inclusion of a benediction and invocation in the graduation ceremony. In rejecting the argument that the free exercise rights of many would be infringed upon by discontinuing the invocation, the court noted, "the First Amendment right of the people does not give them a right to have government provide them public prayer at government functions and ceremonies, even if the majority would like it."[67]

In *Stein v. Plainwell Community Schools,*[68] the Sixth Circuit Court of Appeals also concluded that invocations and benedictions at graduation ceremonies are unconstitutional, but did so based on an application of *Marsh,* rather than *Lemon.* The majority opinion in *Stein* concluded that invocations and benedictions might pass constitutional muster under *Marsh* if such prayers did "not go beyond 'the American civil religion,'" and preserved "the substance of the principle of equal liberty of conscience."[69] The reasoning of the court in *Stein* appears faulty in light of the Supreme Court's statement in *Edwards v. Aguillard* that the historical approach applied in *Marsh* was inapplicable in the school setting.

A recent decision by the federal district court in Rhode Island rejected *Stein's* extension of the *Marsh* analysis to the public school setting. The court in *Weisman v. Lee,*[70] ruled that the inclusion of an invocation and benediction invoking a deity at a public school graduation has the impermissible effect of advancing religion. The court stated that, "[t]he special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice . . . . [T]he practice of including prayer may have the effect of either endorsing one religion over others, or of endorsing religion in general."[71] The court also indicated that the challenged prayer would have passed constitutional muster, if it had simply left out one reference to "God."

Aside from federal constitutional questions, state constitutional provisions may also be brought into questions. In *Kay v. David Douglas School District No. 40,*[72] the Oregon Court of Appeals affirmed the District Court's Order enjoining the inclusion of formal prayer in commencement exercises, finding the practices violative of Article I, Sections 2 and 3 of the Oregon Constitution. Similarly in *Bennett v. Livermore Unified School District,*[73] the California Court concluded that a religious invocation at a graduation ceremony violated both federal and California constitutional provisions.

The state constitutional issue may cut in both directions. State provisions may be more or less stringent than federal provisions, but so long as the Supreme Court continues to apply the religion clauses of the federal constitution to state action, less stringent state constitutional provisions will be of little consequence.

In both prayer at extracurricular activity and prayer at graduation ceremony cases, school districts have tried to distinguish prayer in that setting from prayer in the classroom based on the location of the event, the presence of adults as well as students in the audience, the voluntary nature of attendance at the events, and the *de minimis* nature of the establishment clause violation.

A majority of the courts have concluded that where an event is sponsored by the school, or part of the school's regular extracurricular program, it bears the imprimatur of school approval, whether it occurs in a classroom, a gymnasium, or an athletic field. Even though the student-teacher relationship might not play as heavy a role outside the classroom setting, the element of school endorsement of the religious activity has still been found to be present.

Further, even though the presence of parents or other adults at extracurricular events might lessen the effect of peer pressure on students, students are not adults, and are seen by the courts as young and impressionable. While the Supreme Court in *Marsh* noted that adult legislators are mature enough to form their own opinions on religion, and are less likely than students to be influenced by the religious practice, the mere presence of adults at school events does not change the analysis in the school setting.

Finally, even though the prayers are relatively short, because coercion need not be shown to prove an establishment clause violation, even a minor violation cannot be tolerated.

RELIGIOUS DISPLAYS [74]

In deciding whether religious display may be present in public schools, courts have focused on whether the displays are presented in a religious or secular manner. In *Stone v. Graham,*[75]*a* Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom was held constitutional. The court found that the statute had no secular purpose despite the legislative's avoided intent to reflect the adoption of the Commandments as the fundamental legal code of western civilization and the common law of the United States.

The Court concluded that the preeminent purpose of posting the Commandments was plainly religious. The Court pointed to the facts that the Commandments are a sacred religious text in the Jewish and Christian faiths and relate to religious duties as well as secular matters.

In *Florey v. Sioux Falls School District* 49-5[76], the Eighth Circuit Court of Appeals approved a school's temporary display of religious symbols with religious holidays where the symbols were used only as a teaching aid and were displayed only as examples of the cultural or religious heritage of the holiday. The Court emphasized that the prevailing purpose of the holiday display must be educational, i.e., to advance a student's knowledge of a cultural heritage.

The Supreme Court has considered a number of cases involving religious displays or public property which did not directly involve public schools, but which may shed some light on the difficulties inherent in such displays.

In Lynch v. Donelly,[77] the Town of Pawtucket, Rhode Island, erected its annual Christmas display in a park owned by a nonprofit organization. The display was sponsored by the city and included a creche or nativity scene which the American Civil Liberties Union and its members contended was a violation of Establishment Clause. The Supreme Court held 5-4 that the circumstances did not constitute a First Amendment violation notwithstanding the religious significance of the creche. In reaching that conclusion, the Court commented that a complete separation of church and state is not constitutionally required, that the Constitution affirmatively mandates accommodation—as distinguished from mere tolerance—of all religions and forbids hostility toward any. "In God We Trust" and "One nation under God" and the officially designated holidays of Thanksgiving and Christmas, the Court noted were some examples of government's acknowledgement of religious heritage.

After noting that there is no absolute line to be drawn in Establishment Clause cases, the Court recited the 3-prong *Lemon* test and concluded that the city had a secular purpose for including the creche, since the display sponsored by the city was for the purpose of celebrating and depicting the origins of Christmas, a national holiday. As to the effect of the creche, the Court found that any benefit to one faith or religion that might be present was indirect, remote and incidental. The Court further opined that the aid to religion under the circumstances of the case was no greater than in those cases where benefits had been held not to violate the establishment clause, as, for instance, the expenditure of public money for textbooks supplied to students at parochial schools and other matters of that kind. Finally, the Court concluded that there was no administrative or excessive entanglement between religion and state and made particular note of the fact that there was no evidence that any particular church or church group had participated in determining the content or design of the display.

The Supreme Court appears to have placed some new wrinkles in the old *Lemon* three-part test. In regard to the first part of that test, the Court appears to say that if the government can articulate a legitimate secular legislative purpose for its policy, the *plaintiff* has the burden of proving that the stated purpose is merely a subterfuge or pretext for a surreptitious or purposeful advocacy of religion. In many earlier cases, the courts seem to have placed the burden on the government to prove that its purpose was secular and not religious. In regard to the second part of the test, the Court seems more willing and eager to weigh the secular purpose against the potential advancement of religion. An indirect, remote or incidental benefit upon religion alone does not render a law constitutionally invalid. Entanglement also is a matter of degrees, that which is *de minimus* does not violate the establishment clause.

In the three years since *Lynch v. Donnelly,* three other cases involving public Christmas displays have reached the Supreme Court. In two of the cases, the Supreme Court denied *certiorari* of circuit court opinions prohibiting the public display of a nativity scene and a Latin cross. In the third case, however, an equally divided court affirmed a second circuit court of appeals decision allowing a nativity display on public property.

These three holdings may be categorized according to the test applied by the courts of appeals. The first test may be characterized as "and Santa too" test, which divines the purpose of the display by considering it in the context of the other Christmas decorations. The second test can be characterized as a "when is a cross not a cross" test which distinguishes between those Christmas decorations which are solely religious symbols and those which are not.

In McCreary v. Stone,[78] 739 F.2d 716 (1984), *aff'd,* 471 U.S. 83 (1984), the second circuit enjoined the village of Scarsdale from prohibiting a private, unincorporated association of seven churches from displaying a creche in a public park during the holiday season. The second circuit relied heavily on the Supreme Court decision in *Lynch v. Donnelly,* and it applied the three-pronged test established in *Lemon v. Kurtzman,* in ruling that the creche display was not a violation of the establishment clause. The holding in *McCreary* was premised upon the finding that the park was a traditional public forum, that the village's denial of the association's application was content based on that granting the application was content based and that granting the application would not foster excessive administrative entanglement between church and state. Additionally, a disclaimer appeared on the creche indicating that the village had not sponsored the display—although the Court noted that the disclaimer sign may be too small.

The court rejected the village's reading of *Lynch* and held that the "Supreme Court did not decide the Pawtucket case based upon the physical content within which the display of the creche was situated; rather the Court consistently referred to the creche in the context of the Christmas season or the Christmas holiday season." [79] By a 4-4 vote, with Justice Powell taking no part in the decision, the Supreme Court affirmed the second circuit's opinion.

Approximately eleven months after the Supreme Court decision in *McCreary*, the sixth circuit held that the display of a city-owned nativity scene on the front lawn of the City Hall of Birmingham, Michigan, unaccompanied by other Christmas decorations violated the establishment clause of the first amendment. *American Civil Liberties Union v. City of Birmington.*[80] In this case, the district court had found that the display had failed all three prongs of the *Lemon* test and issued an injunction prohibiting the creche display on the front lawn of the city hall. The sixth circuit, however, based its prohibition of the nativity scene on the fact that it had the primary effect of advancing and approving the Christian religion. The court disagreed with the *McCreary* holding and found that since the display was not accompanied by other secular symbols of Christmas, it violated the establishment clause. The court construed *Lynch* to mean that:

> A city is free to display such at Christmas if it is balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin. If enough such symbols are displayed, the manger scene will pass constitutional muster. It may be convenient to think of this as a 'Saint Nicholas too' test—a city can get by with displaying a creche if it throws in a sleigh full of toys and a santa, too.[81]

The third case involved the prohibition of an illuminated Latin cross on top of a fire station as part of the City of St. Charles' annual Christmas display. *American Civil Liberties Union of Illinois v. City of St. Charles.*[82] The district court had granted the ACLU's request for a preliminary injunction against lighting the cross. The seventh circuit affirmed this injunction because "the St. Charles cross unmistakably signifies Christianity, as the reindeer and Santa Claus, and even the star and wreath, do not."[83] The court stated that Christmas has obtained its status as a national holiday in part because of "the fact that most Christmas symbology either is unrelated to Christianity or is no longer associated with its popular understanding. There is nothing distinctively Christian about reindeer, Santa Claus, gift giving, egg nog, tinsel, toys, retail sales, roast goose, or the music (as distinct from the words) of Christmas carols...but the Latin cross has not lost its Christian identity, though some other crosses have."[84] The thrust of the Seventh Circuit's analysis was aimed at the meaning conveyed by the Christmas decoration and not at the overall effect of the entire display.

The Supreme Court's divided views on this issue were again reflected in its most recent decision.

In a split decision in *Allegheny County v. Greater Pittsburgh ACLU,*[85] the Supreme Court ruled on the constitutionality of two Christmas holiday displays in Pittsburgh, Pennsylvania. A nativity scene in the county courthouse was held to violate the Constitution's establishment of religion clause, but a display outside the city-county building of a 45-foot decorated Christmas tree, an 18-foot Chanukah menorah and a "salute to liberty" message from the mayor was upheld.

Justice Blackmun wrote the opinion for the court, holding that because of the prominent placement of the nativity scene, the inclusion in the display of a plaque stating that it was donated by a religious society and a banner proclaiming, "Gloria in Excelsis Deo!," together with the lack of any other items in the display which would dilute its religious message, the display had the primary effect of endorsing Christianity.

Conversely, the Court held that the effect of the other display on a "reasonable observer" is merely to acknowledge the cultural diversity of this country and recognize the "different traditions for celebrating the winter-holiday season."[86]

Justice Brennan, in a dissent in which Marshall and Stevens joined, stated his belief that both displays are unconstitutional. He opined that although Chanukah has some secular background, it is not a secular holiday and "the menorah is indisputable a religious symbol, used ritually in a celebration that has deep religious significance. That...is all that need be said."[87]

Justice Kennedy, Chief Justice Rehnquist, Justices White and Scalia would hold that both displays are constitutional, because they believe a religious display does not violate the Constitution unless it has coercive effect. Justice O'Connor was the only justice who agreed with Blackmun's conclusion on both issues.

All of the opinions discussed at length the Court's 1984 opinion in *Lynch v. Donnelly*. That case upheld a Christmas display in Pawtucket, Rhode Island which included a nativity scene. Justice Blackmun, ignoring the majority opinion in that case, adopted as his own Justice O'Connor's concurrence to the effect that the "crucial" question is whether the government's action has the effect of "communicating a message of government endorsement or disapproval of religion."[88]

Because of his emphasis on the need to examine the particular facts of each case, Justice Blackmun's opinion includes pictures of the two displays and extensive discussion about the differences between the displays, including a description of the nature and location of each object in the display and the effect of its inclusion on the viewer. This discussion prompted Justice Brennan to say in his dissent "I shudder to think that the only 'reasonable observer' is one who shares the particular views on perspective, spacing, and accent expressed in Justice Blackmun's opinion, thus making analysis under the establishment clause look more like an exam in Art 101 than an inquiry into constitutional law."[89]

Justice Kennedy on the other hand, writing for the dissent on this issue found the the comparison of the other objects in the *Lynch v. Donnelly* display (a talking wishing well and a Santa Claus, among other things) disturbing because he believes the case was not based on the fact that "secular" objects were included in the display. He believes that the decision in *Lynch* would have been the same even had the display included only the nativity scene. He faulted Justice Blackmun for adopting the concurring opinion in *Lynch*. "Since the majority does not state its intent to overrule *Lynch*, I find its refusal to apply the reasoning of the decision quite confusing."[90]

Although Justice O'Connor agreed with Justice Blackmun's analysis as to the standards for determining whether a particular public religious display violates the first amendment, she disagreed with his characterization of Chanukah as a "secular holiday." She would hold that the state can establish religion by endorsing a minority religion through the display of a religious symbol like a menorah. The inquiry under Justice O'Connor's analysis is whether by displaying the symbol the state is endorsing Judaism or merely indicating "that the city intended to convey its own distinctive message of pluralism and freedom."[91]

It is unclear how the Court would rule in a case involving religious displays in public schools. In a footnote, Justice Blackmun noted that the combined display in a public building of a Christmas tree and a menorah is not necessarily always constitutional. As an example, he pointed out that the "special sensitivity in the public-school context"[92] may require additional constitutional considerations. Perhaps the rule in the school context is to determine the effect of the display on a "reasonable student observer." Nevertheless, school districts which display religious symbols during the holidays would be well advised also to include educational programs explaining the displays with emphasis on this country's cultural and religious diversity.

HOLIDAY OBSERVANCES

As is apparent from the discussion above, the display of religious symbols in a public context often occurs as part of holiday observances. In *Florey*, the eighth circuit also approved the school district's policy regarding holiday observances which the court believed had a secular and not a religious purpose. The court apparently applied a balancing test by weighing the secular purposes for the observance of the religious holidays as described by the school system against the potential effects of such holiday observances on the advancement of religion and concluded that the educational justification provided by the board outweighed any potential danger of an advancement of religion.

See Appendix A for more information on the observance of religious holidays in the public schools.

ENDNOTES

1. The First Amendment to the United State Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

2. *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

3. *Id.* at 303-04.

4. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

5. *County of Allegheny v. American Civil Liberties Union,* 57 U.S.L.W. 5045 (U.S. July 3, 1989) (No. 87-2050).

6. *Marsh v. Chambers,* 463 U.S. 782 (1983) (Brennan, J., dissenting).

7. *See,* Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis,* 58 N.Y.U.L. Rev. 364 (1983).

8. 370 U.S. 421 (1962).

9. 374 U.S. 203 (1963).

10. 370 U.S. at 425.

11. 374 U.S. at 223.

12. *Id.*

13. *Id.* at 224-25.

14. *Id.* at 225. The court stated: "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties." (citation omitted).

15. *See Wallace v. Jaffree,* 472 U.S. 38 (1985).

16. 653 F.2d 897 (5th Cir. 1981).

17. *Id.* at 901.

18. *See Breen v. Runkel,* 614 F. Supp. 355 (W.D. Mich. 1985).

19. *See, e.g., Clark v. Dallas Independent School Dist.,* 671 F. Supp. 1119 (N.D. Tex. 1987); *Breen, supra* note 18.

20. Nothing in the case law suggests that a student cannot privately pray at school; problems arise only when it becomes an organizeda activity, or students wish to share their prayers aloud with others. *See Wallace v. Jaffre,* 472 U.S. 71, 73 (1985) (O'Connor, J., concurring).

21. *DeSpain v. DeKalb County Community School District* 428, 384 F.2d 836 (7th Cir. 1967), *cert. denied,* 88 S.Ct. 815 (1968).

22. *See Schempp,* 374 U.S. 203 (1963); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir. 1981).

23. *Karen B.,* 653 F.2d at 897; *Collins v. Chandler Unified School Dist.,* 644 F.2d 759 (9th Cir. 1981); *Goodwin v. Cross County School Dist.* No. 7, 394 F. Supp. 417 (E.D. Ark. 1973).

24. *See, Steele v. Van Buren Public School Dist.,* 845 F.2d 1492 (8th Cir. 1988).

25. *Wallace v. Jaffree,* 472 U.S. 38 (1985).

26. *Id.* at 70 (O'Connor, J., concurring).

27. *See,* Note, 58 N.Y.U.L. Rev. 364, 407-08.

28. *Id.*

29. 374 U.S. at 281.

30. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard,* 47 Minn. L. Rev. 329 (1963); Kauper, *Prayer, Public Schools and the Supreme Court,* 61 Mich. L. Rev. 1031 (1963).

31. *Wallace v. Jaffree,* 472 U.S. at 73 (O'Connor, J., concurring).

32. *See* notes 33-49 and accompanying text.

33. 421 F. Supp. 337 (D. Mass. 1976).

34. *Id.* at 339 (citing St. 1966, ch. 130, as amended by St. 1973, ch. 621; Mass. Gen. Laws ch. 71, section 1A).

35. *Duffy v. Las Cruces Public Schools,* 557 F. Supp. 1013, 1015 (D. N.M. 1983) (citing N.M. Stat. Ann § 22-5-4.1 (1978)).

36. 421 F. Supp. at 341-44.

37. 557 F. Supp. 1013 (D. N.M. 1983).

38. *Id.* at 1015.

39. *Id.* at 1016.

40. *See Wallace v. Jaffree,* 472 U.S. 38 (1985).

41. 105 S.Ct. 2479, 2481 (citing Ala. Code § 16-1-20).

42. *Id.* (citing Ala. Code § 16-1-20.1).

43. *Id.* (citing Ala. Code § 16-1-20.2).

44. *Wallace,* 472 U.S. at 39.

45. *Id.* at 38.

46. *Id.* 105 S.Ct. at 2492.

47. *Id.*

48. 108 S.Ct. 388 (1987).

49. *May v. Cooperman,* 780 F.2d 240 (3d Cir. 1985) (citing N.J. Stat. Ann. 18a: §36-4).

50. 472 U.S. at 76.

51. 563 F. Supp. 883 (S. D. Tex. 1982).

52. *Id.* at 884.

53. 862 F.2d 824 (11th Cir. 1989), *cert. denied,* ____ U.S. ____ (1989).

54. 463 U.S. 783 (1983).

55. 862 F.2d at 828.

56. 107 S. Ct. 2573 (1987).

57. 862 F.2d at 829.

58. *Id.*

59. *Id.* at 829-30.

60. *Grossberg v. Deusebio,* 380 F. Supp. 285, 289 (E.D. Va. 1974). For an excellent discussion of cases concerning prayers at graduation *see,* DuPuy, *Religion, Graduation and the First Amendment: A Threat or a Shadow?* 35 Drake L. Rev. 323 (1985-86).

61. *Id.*

62. *Wood v. Mt. Lebanon Township School Dist.,* 342 F. Supp. 1293, 1295 (W.D. Pa. 1972).

63. *Wiest v. Mt. Lebanon School District,* 457 Pa. 166, 320 A.2d 362, *cert. denied,* 419 U.S. 967 (1974).

64. 608 F. Supp. 531 (D. Iowa 1985).

65. *Id.* at 535.

66. *Id.*

67. *Id.* at 537.

68. 822 F.2d 1406 (8th Cir. 1987).

69. *Id.* at 1409.

70. 728 F. Supp. 68 (D.R.I. 1990).

71. *Id.* at 73.

72. 79 Or. App. 384, 719 P.2d 875, *rev'd,* 303 Or. 574 (1987).

73. 238 Cal. Rptr. 819 (Cal. App. 1987).

74. The following discussion on religious displays and holiday observances in the public schools is adopted from materials prepared by William Fearen of Cleckner and Fearen, Harrisburg, PA; Douglas Punger, Attorney, Winston-Salem/Forsyth County Schools, Winston-Salem, NC and Gwendolyn Gregory, Deputy General Counsel, NSBA for previous Council of School Attorneys' seminars and publications.

75. 449 U.S. 39 (1981).

76. 619 F.2d 1311 (8th Cir.), *cert. denied,* 449 U.S. 987 (1980).

77. 465 U.S. 668 (1984).

78. 739 F.2d 716 (2d Cir.), *aff'd,* 471 U.S. 83 (1984).

79. *Id.* at 729.

80. 791 F.2d 1561 (6th Cir. 1985), *cert. denied,* 107 S.Ct. 421 (1986).

81. *Id.* at 569.

82. 794 F.2d 265 (7th Cir. 1986), *cert. denied,* 107 S.Ct. 458 (1986).

83. *Id.* at 272.

84. *Id.* at 271-72.

85. 109 S.Ct. 3086 (1989).

86. *Id.* at 3115.

87. *Id.* at 3127 (Brennan, J., concurring in part, dissenting in part).

88. *Lynch,* 465 U.S. at 692 (O'Connor, J., concurring).

89. *Allegheny,* 109 S.Ct. at 3127 (Brennan, J., concurring in part, dissenting in part).

90. *Id.* at 3141 (Kennedy, J., concurring in part, dissenting in part).

91. *Id.* at 3122 (O'Connor, J., concurring in part).

92. *Id.* at 3115 n. 69.

Appendix A

Religious Holidays in the Public Schools: Questions and Answers *

Since 1776 the United States has grown from a nation of relatively few religious differences to one of countless religious groups. This expanding pluralism challenges the public schools to deal creatively and sensitively with students professing many religions or none.

The following questions and answers concern religious holidays and public education, a subject often marked by confusion and conflict. Teachers and school officials, as well as parents and students, should approach this discussion as an opportunity to work cooperatively for the sake of good education rather than at cross-purposes.

School districts developing guidelines about religious holidays will want to base their policies in the shared commitment of respect for individual religious beliefs expressed in the constitutional guarantee of religious liberty. This means that public schools may neither promote nor inhibit religious belief or nonbelief. Drafters of such guidelines also will want to take account of the role of religion in history and cultures.

Awareness of legal issues is essential in considering religion and public education, but the law does not supply answers to every question. Within the current legal framework, schools—their boards, administrators, teachers, parents and students—must make many practical decisions regarding religious holidays. This work can be done only by showing sensitivity to the needs of every student and a willingness to steer a course between the avoidance of all references to religion on one hand and the promotion of religion on the other.

Q: What do the courts say?

A: The Supreme Court has ruled that public schools may not sponsor religious practices (*Engel v. Vitale*, 1962; *Abington v. Schempp*, 1963) but may teach about religion.

While having made no definitive ruling on religious holidays in the schools, the Supreme Court let stand a lower federal court decision stating that the recognition of holidays may be constitutional if the purpose is to provide secular instruction about religious traditions rather than to promote the particular religion involved (*Florey v. Sious Falls School District*, 8th Cir., 1980).*

Q: Do religious holidays belong in the curriculum?

A: The study of religious holidays may be included in elementary and secondary curricula as opportunities for teaching about religions. Such study serves the academic goals of educating students about history and culture, as well as the traditions of particular religions within a pluralistic society.

Q: When should teaching about religious holidays take place?

A: On the elementary level, natural opportunities arise for discussion of religious holidays while studying different religious holidays while studying different cultures and communities. In the secondary curriculum, students of world history or literature have opportunities to consider the holy days of religious traditions. Teachers find it helpful when they are provided with an inclusive calendar noting major religious and secular holidays with brief descriptions of their significance.

Q: How should religious holidays be treated in the classroom?

A: Teachers must be alert to the distinction between teaching about religious holidays, which is permissible, and celebrating religious holidays, which is not. Recognition of and information about holidays may focus on how and when they are celebrated, their origins, histories and generally agreed-upon meanings. If the approach is objective and sensitive, neither promoting nor inhibiting religion, this study can foster understanding and mutual respect for differences in belief.

Teachers will want to avoid asking students to explain their beliefs and customs. An offer to do so should be treated with courtesy and accepted or rejected depending upon the educational relevancy.

Teachers may not use the study of religious holidays as an opportunity to proselytize or to inject personal religious beliefs into discussions. Teachers can avoid this by teaching through attribution, i.e., by reporting that "some Buddhists believe..."

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* *This guide is jointly sponsored by sixteen religious and educational organizations, including NSBA.*

Q: May religious symbols be used in public school classes?

A: The use of religious symbols, provided they are used only as examples of cultural and religious heritage, is permissible as a teach aid or resource. Religious symbols may be displayed only on a temporary basis as part of the academic program. Students may choose to create artwork with religious symbols, but teachers should not encourage or discourage such creations.

Q: May religious music be used in public schools?

A: Sacred music may be sung or played as part of the academic study of music. School concerts that present a variety of selections may include religious music. Concerts should avoid programs dominated by religious music, especially when these coincide with a particular religious holiday.

The use of art, drama or literature with religious themes also is permissible if it serves a sound educational goal in the curriculum but not if used as a vehicle for promoting religious belief.

Q: What about Christmas?

A: Decisions about what to do in December should begin with the understanding that public schools may not sponsor religious devotions or celebrations; study about religious worship or practice.

Does this mean that all seasonal activities must be banned from the schools? Probably not, and in any event such an effort would be unrealistic. The resolution would seem to lie in devising holiday programs that serve an educational purpose for all students—programs that make no students feel excluded or identified with a religion not their own.

Holiday concerts in December may appropriately include music related to Christmas and Hanukkah, but religious music should not dominate. Any dramatic productions should emphasize the cultural aspects of the holidays. Nativity pageants or plays portraying the Hanukkah miracle are not appropriate in the public school setting.

In short, while recognizing the holiday season, none of the school activities in December should have the purpose, or effect, of promoting or inhibiting religion.

Q: What about religious objections to some holidays?

A: Students from certain religious traditions may ask to be excused from classroom discussions or activities related to particular holidays. Some holidays considered by many people to be secular (for example, Halloween and Valentine's Day) are viewed by others as having religious overtones.

Excusal requests may be especially common in the elementary grades, where holidays are often marked by parties and similar non-academic activities. Such requests are routinely granted.

In addition, some parents and students may make requests for excusals from discussions of certain holidays even when treated from an academic perspective. If focused on a limited, specific discussion, such requests may be granted in order to strike a balance between the student's religious freedom and the school's interest in providing a well-rounded education.

Administrators and teachers should understand that a policy or practice of excusing students from a specific activity or discussion cannot be used as a rationale for school sponsorship of religious celebrations or worship for the remaining students.

Q: May students be absent for religious holidays?

A: Sensitive school policy on absences will take account of the religious needs and requirements of students. Students should be allowed a reasonable number of excused absences, without penalties, to observe religious holidays within their traditions. Students may be asked to complete makeup assignments or examinations in conjunction with such absences.

Q: What steps should school districts take?

A: In a pluralistic society, public schools are places for persons of all faiths or none. Schools may neither promote nor denigrate any religion. In order to respect religious liberty and advance education, we recommend that each school district take the following steps:

- Develop policies about the treatment of religious holidays in the curricula and inform parents of those policies.
- Offer pre-service and in-service workshops to assist teachers and administrators in understanding the appropriate place of religious holidays in the schools.
- Become familiar with the nature and needs of religious groups in the school community.
- Provide resources for teaching about religions and religious holidays in ways that are constitutionally permissible and educationally sound.

The Equal Access Act and Student Groups

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INTRODUCTION

One cannot discuss the broad issue of "Religion and Schools" without discussing the Equal Access Act.[1] On the other hand, one cannot discuss the Equal Access Act without discussing many other issues relating to the subject of religion in the schools.

THE ACT

The Equal Access Act reads as follows:
SHORT TITLE
Sec. 801. This title may be cited as "The Equal Access Act."
DENIAL OF EQUAL ACCESS PROHIBITED
Sec. 802.
(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited.

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined.

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria.

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that —

(1) the meeting is voluntary and student-initiated;
(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Federal or State authority nonexistent with respect to certain rights.

Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof —

(1) to influence the form or content of any prayer or other religious activity;
(2) to require any person to participate in prayer or other religious activity;
(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
(5) to sanction meetings that are otherwise unlawful;
(6) to limit the rights of groups of students which are not of a specified numerical size; or
(7) to abridge the constitutional rights of any person.

(e) Unaffected Federal financial assistance to schools.

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order-and-discipline, well-being, and voluntary-presence concern.

Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS
Sec. 803. As used in this sub-chapter —
(1) The term "secondary school" means a public school which provides secondary education as determined by State Law.
(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.
(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.
(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY
Sec. 804.

If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

CONSTRUCTION
Sec. 805.

The provisons of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter. (Title VIII of the Education for Economic Security Act, P.L. 98-377 August 22, 1985.)[2]

Basic Requirements

The Act provides that:

> [It is] unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity, or discriminate against, any students who wish to conduct a meeting within the limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[3]

The key words or phrases in this statement are:

a. secondary school;
b. federal financial assistance;
c. limited open forum;
d. fair opportunity; and
e. meeting.

- Secondary School

A secondary school means a public school which provides secondary education as determined by state law.[4]

For example, a school system that has a structure of K-5 6-8 and 9-12 would be subject to the Act's requirements in grades 6-12 in most states. In states such as Pennsylvania, a middle school would be considered a secondary school. However, if the 5th grade were also in the middle school, arguably, the Act would not apply to grade 5 but would apply to grades 6-8 in the same building.

- Federal Financial Assistance

The Act does not specify how this is to be applied to schools. However, in light of the trend to interpret the meaning of federal financial assistance liberally, there probably will not be many public secondary schools to which the Act will not apply.[5]

- Limited Open Forum

The fact that a school may be a secondary school and that it may receive federal financial assistance does not mean that the school would be subject to the Act. This is because of the requirement that there be a limited open forum before the Act is applicable.

A limited open forum is present whenever a school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.[6]

A meeting includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.[7]

"Noninstructional time" is the ". . . time set aside by the school *before* actual classroom instruction begins or *after* actual classroom instruction ends."[8]

The issue of a limited open forum is probably where the bulk of the litigation will occur and has occurred to date.

- Fair Opportunity

A fair opportunity exists where the school uniformly provides that:

(1) the meeting is voluntary and student-initiated;
(2) the school does not sponsor the meeting;
(3) employees of the school are present at religious meetings only in a nonparticipatory capacity;
(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities; and
(5) nonschool persons cannot direct, control, conduct, or regularly attend activities of student groups.[9]

Again, unless there is a limited open forum, this issue need not be reached because if a limited open forum does not exist, then a fair opporunity for student groups to meet is not necessary under the Equal Access Act. However, such a right might occur, for example, on first amendment grounds.

- Meeting

The term "meeting" is defined as including ". . . those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum."[10]

Again, no meeting will or must occur unless there is a limited open forum. In addition, if all "activities" are curriculum related, then there will not be any meeting either.

Purpose

It is generally conceded that the Equal Access Act was passed by the U.S. Congress to implement the case of *Widmar v. Vincent*[11] at the public secondary school level.[12]

Widmar held that a university that had created a limited open forum could not deny that forum to a student group that wanted to use it for prayer and religious discussion. The U.S. Supreme Court reached this conclusion even though the university contended that to permit such use for religious purposes would violate the establishment clause.

The Court in *Widmar* expressly noted that its holding did not necessarily apply to public secondary schools.[13]

On the other hand, some would argue that the Act was passed to undo the Third Circuit Court of Appeals ruling in *Bender v. Williamsport Area School Dist.*[14] In this case, the Third Circuit reversed a federal district court decision and held that a student organization devoted to prayer and other religious activities, which met during the regularly scheduled student activity period, violated the establishment clause of the first amendment to the U.S. Constitution. That decision was filed on July 24, 1984 and President Reagan signed the Equal Access Act into law on August 11, 1984.[15]

Whatever the reason, it is evident that the Act was intended to "loosen up" the public schools for use by students for religious purposes.

THE CASES

The first appellate decision in the federal courts decided under the Equal Access Act was *Student Coalition for Peace v Lower Merion School District*.[16] (hereinafter referred to as *SCP* or SCP, as appropriate).

SCP was a student organization at the Lower Merion High School in suburban Philadelphia, Pennsylvania. The group was dedicated to the cause of peace through nuclear disarmament. In early 1983 the group requested permission to use an athletic field on school premises, known as Arnold Field. The principal refused the request, as the board did later. The SCP held a peace fair on April 30, 1983, at another field five miles from the high school and not under the board's jurisdiction.

Arnold Field had been regularly used for non-school-sponsored community events. A Memorial Day service had been held there since 1945; it had been used for a Special Olympics; and a "Bike Hike" for the mentally retarded, under the sponsorship of a high school student organization. The field typically fenced, but unlocked, was used regularly without permission by joggers, bicycle riders and other such persons.

In December, 1983, SCP again asked for use of the field for a second Peace Fair to be held on April 28, 1984. The fair was to be open to the public and was to include speakers on the subjects of peace and nuclear disarmament, distribution of literature and various forms of entertainment. The principal denied the request, noting the field was to be used for athletic or governmental purposes.

On appeal, the superintendent likewise rejected the request, as well as a request for another field, Pennypacker, or the high school boys' gym. The superintendent indicated the specific use of Arnold Field was a long-standing practice of the district. The request to use the gym was denied because of the potential damage to the wooden floor. He did suggest SCP request use of the auditorium and lobby for the fair.

Having rejected the audiorium idea as being unsuitable, the SCP appealed to the board, requesting Arnold Field, Pennypacker Field or the boys gym. The board denied the request to use any of these sites, but offered use of the auditorium. The board president, an attorney, justified the decision on the basis that the fair might create crowd control problems and that the school was not an appropriate forum for a "political rally."

The SCP filed suit in the district court pursuant to 42 U.S.C. § 1983 and the first amendment. The district court granted a preliminary injunction ordering the district to allow use of one of the areas for a Peace Fair. The Peace Fair was subsequently held in the boy's gym. After further hearings, the district court entered judgment for the defendants denying the permanent injunction.[17] The court found that none of the sites were public forums by designation or use. The SCP moved for reconsideration where it raised the issue of the Equal Access Act for the first time. On January 31, 1985, the court denied the motion.[18]

On appeal, the Third Circuit Court of Appeals first addressed the issue of whether the SCP had a first amendment right to use Arnold Field. The Court noted that the right of access to government property depends on the nature of the property at issue. If the property is a traditional or designated public forum, the SCP would only be excluded on the basis of the subject matter of speech if the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. On the other hand, if the property is not a public forum, control can be based on subject matter and identity of the speaker so long as the distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral.[19]

The appellate court agreed that Arnold Field was not a traditional public forum. Further, it also concluded on the facts that it was not a designated public forum. In substance, the court affirmed the district court's judgment with respect to the first amendment claims.

With respect to the Equal Access Act, the court noted that it must decide three questions of first impression. First, one must consider ". . . whether the Act authorizes a private cause of action by SCP; second, assuming the answer is in the affirmative, whether the Act applies to student-initiated events involving nonstudents; third, ". . . whether the evidence presented to the district court, all prior to enactment of the Act, was sufficient to decide . . . within the meaning of the Act [whether] a 'limited open forum' had been created."[20]

As to the first question, the court found that it did create judicially enforced obligations, relying on sections 802(a), 804 and 805.[21] The court also noted that the legislative history supported this conclusion as well.[22]

As to whether the Act allows a private cause of action, the court, upon review of the legislative history and relevant case law, concluded that a private cause of action for an injunction under the Act could be maintained.

With respect to the third issue, the court clearly rejected the broad statement that the act does not apply to activities involving nonstudents. Rejecting the district's argument that the Act only applies to students alone, the court construed section 802(c)[23] to read that if nonstudents do not direct, conduct, control or regularly attend such meetings, the school may be required to permit their participation.[24] The court also suggested that the legislative history also supports this conclusion. The court concluded:

> [S]tudent groups wishing to invite nonstudents onto school property are protected by the Act if the school's limited open forum encompasses nonstudent participation in student events, as long as those nonstudents do not 'direct, conduct, control, or regularly attend' such activities.[25]

Importantly, a school is not required to allow just anyone in. "However, the Act's purpose is to enable all students to use the facilities on the same terms as all other students."[26]

As to the question of applicability of the Act to pre-Act situations, the court concluded that the Act should be read to apply only if a limited open forum existed after the Act became law. This conclusion was reached on the basis that, according to the legislative history, Congress was concerned that school districts retain the power to limit or completely deny noncurricular student meetings, as long as such restrictive policies are nondiscriminatory.[27] Because the case was heard before the Act was effective, the court felt SCP should have the opportunity to prove whether a limited open forum existed.

On remand, the district court concluded that SCP was entitled to use the high school gymnasium to hold its rally.[28] The district court noted SCP failed to come forward with any evidence to establish that a limited open forum was created at Arnold Field; that Pennypacker Field is not an open forum; but, that a limited open forum was created at the boys' gym.

It should be noted that the court did listen to the district's concern about damage to the wooden gym floor. It noted that the district could seek assurances from SCP so that damages do not result,[29] noting that the Act states that it is not to be construed to require a political subdivision "'to expend public funds beyond the incidental cost of providing the space for student-initiated meetings.'"[30]

One of the troubling aspects of this case is the factual scenario itself. Compared to the succeeding cases, the court really does not discuss the question of a limited open forum in terms of the student group and its relationship to other student groups that may or may not be curriculum related and meet during the school day. In *SCP* the group was not going to meet during the school day.

Accordingly, it is suggested that *SCP* will not be a major precedent in deciding issues related to limited open forums during a normal school day.

The next federal appellate decision, *Garnett v. Renton School District No. 403*,[31] involved Lindbergh High School, a public secondary school. There, the district makes classrooms available during non-instructional time for use by students in "co-curricular activities." The district has a policy, number 6470, which provides for co-curricular activities and also specifically provides that the district does not have a limited open forum.[32]

Garnett and other students wanted to use a classroom for weekday morning meetings for their non-denominational Christian student group. The group wanted to discuss religious and moral issues, read the Bible, and pray. This request was denied by the district because the club was not curriculum related and because allowing the meetings would violate the establishment clause. The federal district court denied the students' request for a preliminary injunction. On appeal, the Ninth Circuit Court of Appeals affirmed the district court's holding. In its opinion, the court first reviewed the establishment clause claim, applying the three-part *"Lemon test."*[33] With respect to the first part—secular purpose—the court concluded that allowing the meeting in a public high school classroom at a time closely associated with the school day would violate the establishment clause, noting that it would also violate the second and third parts of the *Lemon* test as well, having the primary effect of advancing religion and fostering government entanglement with religion.[34] As to the second part of the test, which evaluates whether the state action neutrally accommodates religion or unconstitutionally sponsors religion, the court held that permitting the group to meet in a public school just before the start of classes would impermissibly advance rather than neutrally accommodate religion.[35] The court reached this conclusion on the basis that the meeting would occur in a tax-supported classroom at a time when most students must be at school.[36] With respect to the third part of the *Lemon* test, entanglement, the court held that because the district was responsible for student safety and discipline, the high school teachers must supervise all student activities, religious or otherwise, at the school. This supervision could lead to teacher interference with or advocacy of religious activities.[37]

As to the question of student free speech, the court found that, based on its policy, the district had not created a limited open forum;[38] therefore, it could limit student expression in any reasonable way. The Court upheld the reasonableness of policy 6470.

Finally, the court briefly reviewed the applicability of the Equal Access Act. The court quickly noted that the Equal Access Act only applies where a limited open forum exists, and since Lindbergh High School does not have a limited open forum, the Act does not apply.[39]

In a subsequent opinion, the Ninth Curcuit concluded that the courts should respect the right of school districts to determine which activities are curriculum related.[40] The court noted:

> Complete de novo review of every school district decision as to what is and what is not curriculum related would invite litigation from every student group denied a classroom for one reason or another, and is not necessary to effectuate the goals of the Act. Courts have always afforded school districts broad discretion in the management of school affairs, limited, of course, by an applicable constitutional or statutory principle. The Equal Access Act does not expressly depart from this principle of deference to the judgment of local school officials. Congress must, therefore, be understood to have legislated in light of this principle. The legislative history supports this interpretation. During debate, Senator Hatfield, a sponsor of the legislation, made clear that the Act in no way seeks to limit a school district's authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum related activities.[41]

However, it also noted that complete deference would also circumvent the Act[42] and concluded that all groups were curriculum related because they "are supervised by faculty advisors and are so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed 'noncurriculum related.' None of . . . [the] clubs is student initiated or student directed. All of the clubs are sponsored by and substantially directed by . . . a faculty advisor or a teacher of a related course."[43] The court did not decide the constitutionality of the Act because it found that the Equal Access Act did not apply in this case.

Mergens v. Board of Education,[44] decided less than one month after the original appellate decision in *Garnett*, stands in sharp contrast to it.

Mergens arose at Westside High School (WHS), a public secondary school receiving federal funds, where students can join various student groups which meet after school hours on school grounds. Students can become members of approximately thirty different groups or clubs on a voluntary basis, all of which have faculty sponsors.

There is no written board policy concerning the formation of clubs, but Board Policy 5610 recognizes such clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills."[45] If students wish to form a club, they present their goals and objectives to a school official who analyzes them and decides whether or not the proposed club is consistent with the policy. No club had ever been denied access to the school until appellants attempted to form a Christian Bible study club in January, 1985.[46]

When the group presented its idea, school administrators rejected it on the basis that to allow the club would violate the establishment clause. In March 1985, the students took their request to the school board. The board denied the request because the proposed club would not be consistent with the board policy which permitted school buildings to be used only for school-sponsored, curriculum-related activities.[47]

In April 1985, the students filed suit in the district court alleging a laundry list of violations; namely, violations of their freedom of speech, assembly, association, the Nebraska Constitution and the Equal Access Act.

The federal district court entered judgment for the school district on February 2, 1988, holding that the high school maintained a closed forum and thus the Equal Access Act did not apply. It also held that the students first and fourteenth amendment rights were not violated.[48]

In reviewing the Act, the Eighth Circuit Court of Appeals first looked at the issue of what is a "limited open forum." This court noted that a limited open forum existed even if only one non-curriculum-related club was present.[49] The students argued that a limited open forum did exist because at least ten clubs were allegedly noncurriculum related, including: the Chess Club; Interact, a service club peripherally connected to Rotary International; Subsurfers, a club for students and community members interested in scuba diving; and Zonta, the female counterpart to Interact.[50]

The court was not very impressed with the district's arguments that the clubs were curriculum related. At trial, the district testified that the Chess Club was related to the curriculum because it fostered critical thinking and logic. The witness for the district said such skills were extensions of the goals for several courses even though the high school does not offer a logic class. He stated that Zonta and Interact are related to the goals of sociology and psychology, and that Subsurfers related to the goals of physical education.[51]

The court did not appreciate this broad interpretation of "curriculum-related." It stated that:

> [a] school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those students clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.[52]

Contrast this with *SCP* wherein the Third Circuit noted that the legislative history made it clear that Congress' concern that school districts retain the power to limit or completely deny noncurricular student meetings, as long as such restrictive policies are reasonable.[53] Obviously, there is a direct conflict between these decisions.[54]

The court rather easily disposed of the constitutional argument on the basis of *Widmar v. Vincent*[55] and held that the Act was constitutional. It found that the facts before it were the same as *Widmar* except for the setting.

The court held:

> The language of the EAA closely tracks the holding of the Court in *Widmar*. In fact, the only difference between the EAA and *Widmar* is the EAA's express extension of the equal access principle to public secondary school students. Any constitutional attack on the EAA must therefore be predicated on the difference between secondary school students and university students. We reject this notion because Congress considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' fact-finding.[56]

Perumal v. Saddleback Valley Unified School District[57] was the first state court decision on the Equal Access Act. In this case, a student religious group known as "New Life" wanted to distribute its flyers on the high school campus and to print its advertisement in the school yearbook. The school district had a policy prohibiting off-campus groups from functioning or advertising on campus. Under the facts of this case the court found that the district did not have a limited open forum. Rather, it had a closed forum and only school-sponsored clubs could function or advertise.[58] Thus, the Equal Access Act did not apply. Furthermore, the court also stated that an advertisement in the student yearbook was not a "meeting" pursuant to the Act.[59]

Thompson v. Waynesboro Area School District[60] in part, reached a similar result as that in *Perumal. Thompson* involved the right of students to distribute a religious newspaper on the property of the school district. With respect to the applicability of the Equal Access Act, the court concluded that the distribution of the religious newspaper was not a "meeting" under the Act. It also noted that it was not a meeting because it was not a voluntary activity as required by the Act.[61]

SUMMARY OF THE CASE LAW

While there have not been many court decisions interpreting the Equal Access Act, there are some questions answered for now. However, there are many more left unanswered. So far, the U.S. Supreme Court has not decided any cases interpreting the Act. However, *Mergens* has been argued before the Court.[62] NSBA filed an *amicus curiae* brief in support of the petition, succinctly stating the problems:

- A conflict exists in the circuits on the question of whether *Widmar v. Vincent* applies to secondary schools;
- It is unclear as to whether the Equal Access Act, which applies to all school districts that receive federal financial assistance, conflicts with the establishment of religion clause of the first amendment to the U.S. Constitution.[63]

The case should be decided before July 1990.

THE PRESENT SITUATION

The following comments are offered to give some ideas and help to the practitioner and to school officials who may be faced with the problems brought about by the Equal Access Act. The balance of this article will be used as an attempt to put the Act in "working order."

As noted before, the essence of the Act is that any public secondary school which receives federal financial assistance that allows any noncurriculum related student groups to meet on school property during noninstructional time (a limited public forum) must also allow other student groups to meet for religious, political and philosophical purposes.

In summary it is important to remember:

- If a public secondary school receives federal funds, the Act may be applicable.
- If such a school has a limited open forum, then the school must apply equal access to any students who want to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
- A limited open forum exists if a school allows noncurriculum related groups to meet on noninstructional time on school premises.
- If all groups are curriculum related, then the Act does not apply.
- A meeting includes activities of student groups which are permitted under the school's limited open forum and not directly related to the school curriculum.
- "Noncurriculum related" will be defined on a case-by-case basis. One must look at the school policy as well as the activities involved to make this determination.
- Schools can decide for themselves (except, perhaps, in the Eighth Circuit) whether any or all groups are curriculum related.
- An activity occurs on noninstructional time if it occurs on time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Thus, if the instructional day is from 9:00 a.m. to 2:00 p.m., students arrived at 8:15 a.m. and leave at 4:00 p.m.; arguably, instructional time is between 9:00 a.m. and 2:00 p.m. If groups meet before 9:00 a.m. or after 2:00 p.m., then, if they are noncurriculum related, you must also allow the "other" student groups to meet as well.

- The student group meeting in a limited open forum situation is proper if: 1) the meeting is voluntary and student-initiated; 2) the school, its agents or employes do not sponsor (promote, lead or participate) the meeting, except that an employe can be assigned for custodial purposes; 3) employees present at a religious meeting are there in a nonparticipatory capacity; 4) the meeting does not interfere with orderly educational activities; and 5) nonschool persons cannot conduct, control, or regularly attend activities of student groups.

- The Act does not authorize schools to:

1) Influence the form or content of any religious activity;
2) Require any person to participate in prayer or other religious activity;
3) Expend funds beyond the incidental cost of providing space for student initiated meeting;
4) Compel any school employe or agent to attend a meeting if the content of the speech there is contrary to their beliefs.
5) Sanction unlawful meetings;
6) Limit the rights of groups of students which are not of a specified numerical size; and
7) Abridge the constitutional rights of any person.

- Based on case law to date, the constitutionality of the Act as it relates to the issue of religion will more than likely be determined by application of the three-part *Lemon* test. Unfortunately, the courts are split on this issue to date, thus putting practitioners on the horns of a dilemma, depending on their circuit and action by the U.S. Supreme Court in *Mergens* or some other case. This issue is critical and needs to be decided in light of potential civil rights liability and attorneys' fees pursuant to 42 U.S.C. § 1983.

- Questions have arisen as to whether school districts should keep any records pursuant to the Equal Access Act. The Act does not require any record-keeping. However, it would seem wise, for the sake of consistency and legal defense purposes, that a record be kept of the approvals and rejections that are made to student groups pursuant to the Act.

- Finally, administrators should be pleased to know that the Act relieves them of the burden of deciding "religious" issues. This is so because the decision is not religion but rather whether a limited open forum exists. This should prove to be a matter of great relief to school officials in light of the complexity of the case law on the various "religious issues."

END NOTES

1. Equal Access Act, 20 U.S.C. § 4071 *et seq.* (Supp. 1989).
2. *Id.* at §§ 4071-4074.
3. 20 U.S.C. § 4071(a).
4. *Id.* at § 4072(1).
5. *Id.* at § 4071(e).
6. *Id.* at § 4071(b).
7. *Id.* at § 4072(3).
8. *Id.* at § 4072(4).
9. *Id.* at § 4071(c)(1-5).
10. *Id.* at § 4072(3).
11. 454 U.S. 263 (1981).
12. *Student Coalition For Peace v. Lower Merion School District,* 776 F.2d 431 (3d Cir. 1985); *Mergens v. Board of Education,* 867 F.2d 1076 (8th Cir. 1989).
13. *Widmar v. Vincent,* 454 U.S. at 274 n.14.
14. 563 F. Supp. 69 (M.D. Pa. 1983), *rev'd,* 741 F.2d 538 (3d Cir. 1984).
15. *Bender,* however, was reversed based on standing by the U.S. Supreme Court and the district court's decision was reinstated. 475 U.S. 523 (1986).
16. 776 F.2d 431 (3d Cir. 1985)
17. 596 F. Supp. 169 (E.D. Pa. 1984).
18. 618 F. Supp. 53 (E.D. Pa. 1985).
19. 776 F.2d at 435.
20. *Id.* at 438.
21. 20 U.S.C. §§ 4071(a), 4073-4074.
22. 776 F.2d at 438-39.
23. 20 U.S.C. §4071(c).
24. 776 F.2d at 442.
25. *Id.*
26. *Id.*
27. *Id.* at 443.
28. 633 F. Supp. 1040 (E.D. Pa. 1986).
29. *Id.* at 1043.
30. *Id.*
31. 865 F.2d 1121 (9th Cir. 1989), *opinion superseded,* 874 F.2d 608 (9th Cir. 1989), *amended* March 3, 1989 and May 15, 1989. The change from the original opinion occurred in the discussion of the application of the Equal Access Act.
32. 874 F.2d at 609. The policy read as follows:

    The criteria to be used for approving co-curricular activites should include but not be limited to:

    1) the purposes and/or objectives shall be an extension of a specific program or course offering;

    2) the activity shall be acceptable to the community;

    3) the activity should have carry-over values for lifetime activities;

    4) the group shall be supervised by a qualified employee;

    5) the cost of the activity must not be prohibitive to student or District;

    6) the activity must comply with Title IX requirements;

7) the activity must take place on school premises unless approved in advance by the school principal; and

8) the activity must not be secretive in nature.

33. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

34. 874 F.2d at 610.

35. 874 F.2d at 611.

36. *Id.*

37. 874 F.2d at 612.

38. *See Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983).

39. 874 F.2d at 612-13.

40. *Id.* at 613-14.

41. *Id.* (citations omitted).

42. *Id.* at 614.

43. *Id.*

44. 867 F.2d 1076 (8th Cir. 1989).

45. *Id.* at 1077.

46. *Id.*

47. *Id.*

48. *Mergens v. Board of Education,* No. 85-0-426 (D. Neb. Feb. 2, 1988).

49. 867 F.2d at 1078.

50. *Id.*

51. *Id.*

52. *Id.*

53. 776 F.2d 431, 443 (3d Cir. 1985).

54. See *also Garnett,* 874 F.2d at 613-14.

55. 454 U.S. 263 (1981).

56. 867 F.2d at 1080.

57. 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (Cal. Ct. App. 1988), *cert. denied,* 109 S. Ct. 327 (1988).

58. 198 Cal. App. 3d at 75, 243 Cal. Rptr. at 549.

59. *Id.* at 71, 243 Cal. Rptr. at 549 n.6.

60. 673 F. Supp. 1379 (M.D. Pa. 1987).

61. *Id.* at 1384.

62. *Board of Education v. Mergens,* 109 S. Ct. 3240 (1989) (cert. granted).

63. *Id.,* Motion For Leave To File *Amicus Curiae* Brief and *Amicus Curiae* Brief of the National School Boards Association, at 3.

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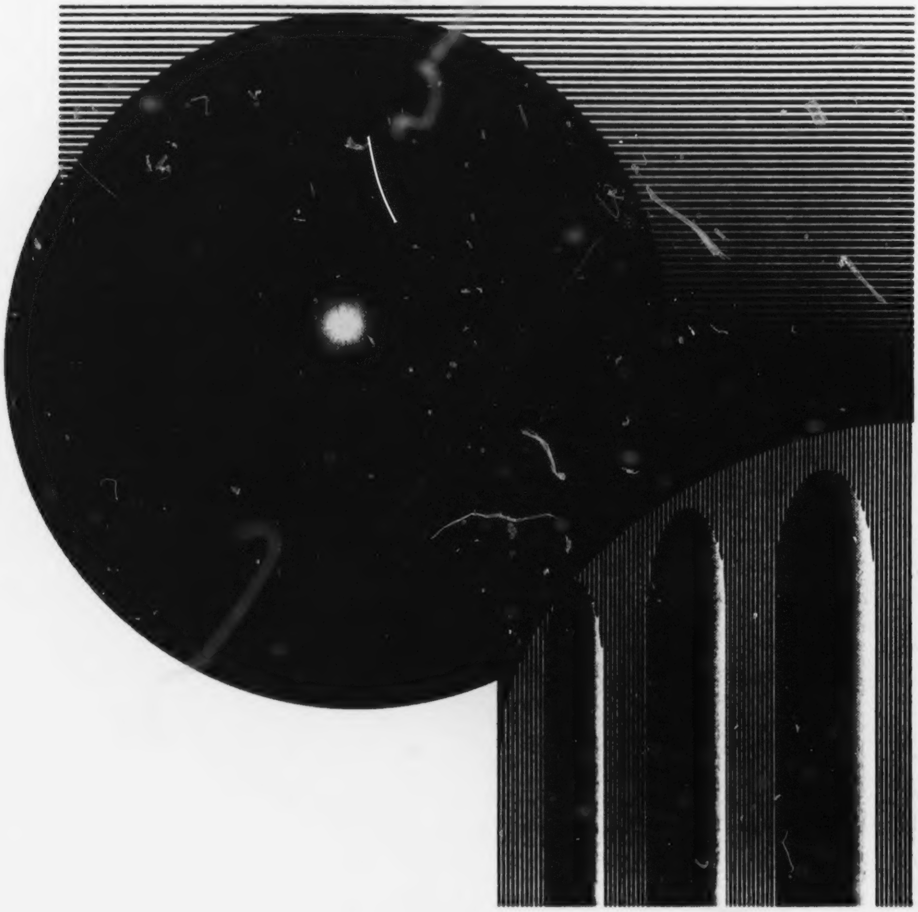

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